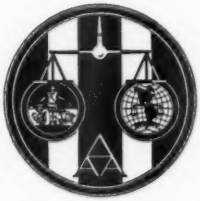
THE ARBITRATION JOURNAL



PUBLISHED BY THE
AMERICAN ARBITRATION ASSOCIATION
IN COLLABORATION WITH THE
CHAMBER OF COMMERCE OF THE STATE OF NEW YORK
AND THE
INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION

THE ARBITRATION JOURNAL is published quarterly, in January, April, July and October, by the American Arbitration Association, in collaboration with the Chamber of Commerce of the State of New York and the Inter-American Commercial Arbitration Commission, and is supplied to members of the collaborating organizations without extra charge.

The annual subscription to non-members is $2.00; Canada, $2.25; foreign, $2.50 (single copies, 60 cents), and should be paid to the American Arbitration Association, 8 W. 40th Street, New York City. Reprints ordered at the time of publication may be obtained at cost.

Applications for membership in the Association, subscriptions and correspondence relating to THE JOURNAL, books for review, etc., should be sent to George A. Little, Executive Editor, 8 W. 40th Street, New York City.

THE ARBITRATION JOURNAL

VOL. 2 JANUARY 1938 NO. 1

IN THIS ISSUE

WITH this issue, the JOURNAL enters upon its second year of publication and rearranges its contents in three separate sections, enabling those interested in commercial or industrial or international arbitration to find more easily the matters of especial interest to them without reading the entire issue. For the convenience of lawyers, court decisions are assembled in one section; and another section of book reviews and notes completes the issue.

Is it possible for an entire industry to eliminate litigation and strikes? Frank Gillmore, in his article on the entertainment field, says it is and tells how the theatre has set an excellent example over a 20-year period (p. 24).

Is labor arbitrating? We publish four of the thirty cases which labor has submitted to the Voluntary Industrial Arbitration Tribunal (p. 42). Others will follow as fast as space permits.

Commodities from all corners of the world are traded on the Commodity Exchange of New York. Julius B. Baer describes (p. 3) the arbitration system for handling disputes, of which the Exchange is rightly proud.

Phrases come and go in the quest for international peace. Peaceful Change is new. Whether it is here to stay, what it is, how it will ultimately affect international peace is set forth in a review of the six most recent books on this subject (p. 47).

Let no one think labor problems are only to be found in America or that all wisdom in their solution is here. The JOURNAL in this issue brings news from Denmark, Canada and Italy (pp. 64-68).

There is many a slip between an arbitration law and a successful proceeding. Nathan Isaacs, in his article on Implementing the Arbitration Statutes (p. 81), shows what these slips are, why they occur and how they can be prevented.

Patent disputes are commonly thought not to be arbitrable. The article on early patent disputes (p. 10) disposes of this theory and shows a retrogression from early escapes from litigation.

Courts continue every day to clarify the ambiguities of legislatures, the looseness of contracts and the vagaries of business relations. The JOURNAL is the only publication where these court decisions are collected and published, in a field where it is so important to know what is happening (p. 89).

FOREWORD

THIS issue of THE JOURNAL marks an historical departure in the consideration of arbitration as an alternative to force, for it unites discussion upon the whole broad front of peaceful change.

Hitherto, it has been the practice, as Mr. Carson points out in his article, to keep each kind of arbitration in a separate category and to see no vital relationship between them. Commercial arbitration, having grown up under the use of contracts, has been relegated to business affairs; industrial arbitration, by reason of the inequality of the parties, has lain buried in conciliatory endeavors; political arbitration has been enmeshed in the diplomatic relations between nations. The idea that these have common objectives and standards has lain obscurely in arbitral thought and discussion.

THE JOURNAL senses an impending change in these separatist relationships. It is evident in the review of the books on Peaceful Change, where economic and commercial relations so deeply penetrate the prevailing thought; it is indicated in the note showing how invasions of the unemployed of one country into the territory of another may lead to threats of war; it is patent in the undertaking of industrial arbitration to approximate the standards of commercial arbitration in obtaining security under agreements and awards; it underlies much of the modern independent thinking.

The significance of this trend of thought (not yet translated into coordinated action) seems to be that since commercial, industrial and political relations, whether in an individual country like the United States or whether existing between nations, are indivisible and vitally affect each other, so their common alternative to force—arbitration—is equally indivisible and should be similarly integrated.

A fragment of this realization has induced the editors of this JOURNAL to extend its pages to include all aspects of arbitration and to present the picture of its activities on the entire front of peaceful change. For the moment we are content to parallel this knowledge in the categories in which men are accustomed to think; but in the confident belief that, as the discussion progresses, there will emerge common objectives, standards and methods and coordinated action, ultimately leading to that science of arbitration which was envisaged in the *Foreword* of the first number of THE JOURNAL.

AMERICAN COMMERCIAL ARBITRATION

ARBITRATION PROCEDURE OF THE COMMODITY EXCHANGE

BY

JULIUS B. BAER *

COMMODITY Exchange, Inc., is a futures market, in New York City, providing facilities for trading in rubber, silk, hides, tin, copper, lead and zinc futures. The satisfactory and amicable settlement of disputes between members of the Exchange, who deal in such a diversified group of commodities, is due in large measure to its compulsory system of arbitration. The unique features of the system are: (1) that only members of the Exchange act as arbitrators, and (2) that the arbitrators are selected in each case by a committee of the Exchange, having special regard for the nature of the controversy and the technical questions involved in its determination. A large percentage of the membership includes persons and firms in foreign countries, and transactions on the Exchange very often involve non-members resident either in this country or abroad. The machinery of arbitration set up by the Commodity Exchange is thus frequently called upon to deal with difficult and complex situations.

All claims, disputes, differences or controversies between members of Commodity Exchange, Inc., arising out of any Exchange transaction, must be submitted to arbitration in accordance with the Exchange's Rules Governing Arbitration; else the defaulting member is subject to disciplinary proceedings. A member cannot

* Member of the New York Bar.

compel a non-member to submit to arbitration proceedings, but a non-member may require a member to arbitrate.

The party applying for arbitration executes a submission on the form provided by the Exchange, reciting briefly the subject matter of the controversy. The submission is filed with the Arbitration Committee and a duplicate served upon the other party, who then files his answer within five days. The submission and answer must be verified, and contain the customary provisions binding the parties to the award and to the judgment to be entered thereon.

The Exchange has a standing Arbitration Committee of seven members, who are elected by the Exchange's Board of Governors for terms of one year. The Committee selects its own Chairman. The Arbitration Committee usually consists of representatives from each of the industries whose products are the subject of futures trading on the Exchange, as well as representatives from commission houses and floor brokers. Upon the submission of a controversy, the Arbitration Committee appoints three arbitrators who must be members of the Exchange. As the membership of the Exchange is extensive and embraces representatives of all of the industries interested in the commodities traded in, this requirement constitutes no serious limitation in obtaining qualified, unbiased arbitrators. The procedure that is usually followed in designating the arbitrators is to select two of the arbitrators from members engaged in the industry or business in which the parties to the controversy are engaged. For example, if the dispute involves a question of interpretation of a silk contract, two of the arbitrators would be members of the Exchange who are registered members of the silk group. If the dispute arises out of the closing of a margin account, two of the arbitrators would be selected from the commission house members, for the particular commodity involved is not of material interest; it is the relationship of customer and broker which is the predominating issue, and the controversy is thus brought within the province and special concern of the commission house members.

The third arbitrator is usually chosen for his general knowledge, ability and understanding. Though not compulsory, one of the arbitrators is usually a member of the Arbitration Committee, which also designates one of the arbitrators to act as Chairman of the arbitrators. Usually the member of the Arbitration Comittee, if serving as an arbitrator, is selected as Chairman.

The Arbitration Committee, in determining the selection of the arbitrators, is usually cognizant of the possible bias, prejudice or partiality of the members of the Exchange, and likewise of the special and expert knowledge of the members concerning the particular problem in controversy. The Rules definitely provide that no arbitrator shall act in any matter in which he is interested. In any event, the parties are given the privilege, within two business days after the mailing of the notice to them of the appointment of the arbitrators, to forward to the Arbitration Committee written objections to one or more of the arbitrators designated. After receipt of the objections the Arbitration Committee or its Chairman finally appoints the arbitrators and gives written notice thereof. So judiciously have the arbitrators been appointed in the past, that only in one instance has a party disapproved the designation of one of the arbitrators.

No hard and fast rules for the procedure of the arbitration hearings are set down, but liberality of procedure is expressly declared to be the guiding principle. In case of difference as to any matter of procedure not expressly covered by the by-laws or rules, the determination of the Arbitration Committee, not contrary to express provisions of law, is binding and conclusive. The procedure generally is similar to that of an action at law, stripped of its formalities and rigidity. Each party produces its own witnesses. The arbitrators possess powers which are ample for conducting the hearing to a rapid and just determination. They may compel the production of papers by members and they may direct members to attend the hearings and give testimony. Disregard of such direction would render a member subject to disciplinary action. Hearings are begun promptly and are pressed to speedy termination; and are private unless the parties request open sessions.

Neither party may be represented at the hearings by an attorney at law or counsel. However, in some instances this prohibition has been waived, as for example, where a non-member who resided abroad submitted a dispute to arbitration in New York.

The award of the majority of the arbitrators constitutes a binding decision. Either party may, however, within six business days, appeal the decision to the Board of Appeals, which is composed of seven members of the Exchange. No member of the Board of Appeals may serve as an arbitrator. Upon appeal, not less than five members of the Board of Appeals shall review the

award and the record, and shall finally determine the rights of the parties, rendering, if they deem it expedient, a new award. The procedure before the Board of Appeals is flexible. In addition to reviewing the award on the basis of the record taken before the three arbitrators, the Board of Appeals has the right to rehear the entire proceedings, or it may decide to receive only supplemental evidence. In one case, the Board of Appeals considered letters from the three arbitrators in which the reasons for their award were set forth.

The Exchange furnishes stenographic and clerical services and other facilities for the conduct of the hearings. The arbitration rules make appropriate provision for compensation to the arbitrators and the Exchange, in connection with the arbitration and appeal. The costs of the arbitration are borne by the losing party unless otherwise awarded.

The distinguishing features of the arbitration proceedings under the Commodity Exchange rules and the advantages flowing from such arbitration are to be found primarily in the method of selection of experts as arbitrators. The advantages of this method are apparent. The time of the parties, witnesses and arbitrators is conserved because no unnecessary time is taken up in explaining customs and practices of the business, or in outlining the background of the controversy; nor need the technical language of the parties and the witnesses be explained for the benefit of the arbitrators. The arbitrators bring a practical, trained, expert knowledge into the determination of their award. Complications which would puzzle the uninitiated, constitute no problem to this type of arbitrator, who can quickly analyze the exact issues to be decided and avoid lengthy excursions into irrelevant matters. The usual hearing before Commodity Exchange arbitrators lasts only for one short session, sufficient for a presentation of the controverted facts. The Commodity Exchange arbitration machinery is ideally suited to the settlement of a dispute involving the quality of goods, the solution of which usually depends upon the opinion of expert witnesses. A board of arbitrators with personal and intimate knowledge on the subject proves invaluable, not only in its ability to understand and judge the witnesses, but because its members are able to form independent opinions based on training and experience.

Of equal importance are the advantages which arise from the fact that, as the arbitrators are selected by an impartial body,

and not by the parties to the controversy, whose representatives then select a third arbitrator or umpire, there is avoided the unfortunate situation in which two of the arbitrators are partisans trying to win the favor of the umpire. The selection of Commodity Exchange arbitrators insures *three* open minded and impartial judges, and the award is the result of their combined judgments, and does not turn on the opinion of only one arbitrator. This also obviates the occasional flare-ups among arbitrators which result in one of them withdrawing from the proceedings, requiring the proceedings to be recommenced. Although the awards of Commodity Exchange arbitrators are not always unanimous, the number of instances in which a dissent appears is rare.

THE INDEPENDENCE OF COMMERCIAL ARBITRATION TRIBUNALS

BY

LUCIUS R. EASTMAN *

ONE of the most cherished and zealously guarded attributes of liberty is the independence of the judiciary. To what extent a similar standard of conduct should be applied in commercial arbitration tribunals, which are quasi-judicial in character, is a question raised by the growing importance and range of arbitration proceedings.

It is a question that requires discussion rather than definite answer, for the present practice of arbitration, generally speaking, is far from being independent.[1]

By an independent tribunal is meant one in which the arbitrators arrive at their decisions on the basis of the facts and evidence submitted, uninfluenced in any personal way by the parties or by political, commercial or any other interests that act independently of the merits of the case. It is, therefore, not enough in an independent tribunal that the arbitrators be impartial; they should also be free from extraneous pressure and considerations during the whole proceedings.

* President, American Arbitration Association.

[1] As industrial tribunals are for the most part in the stage of mediation and are not quasi-judicial bodies, the discussion is limited for the time being to commercial tribunals in which awards are legally enforceable as judgments of the court.

From this viewpoint arbitral tribunals are not, generally speaking, free and independent. Let us examine some of the types of tribunals.

Tribunals established by trade associations to serve their members are, with some few exceptions (as where they are limited to the examination of samples to determine quality) dominated by the policies and objectives of the commercial group and there exists an economic or special interest control. For example, the motive in establishing this type of tribunal may have been to have it keep peace in the industry by means of adjustment and compromise; or it may have been to obtain members. To insure this control, officers of the association are not infrequently made the final arbitrators of the dispute. When these associations establish permanent boards elected by the members or appointed under by-laws, a step toward independence of the tribunal has been taken. Trade tribunals, generally speaking, have, therefore, been established less for their judicial capacity to adjudicate disputes or to adminster justice than to serve the ends of membership, promotion and, in earlier days, the control of competition.[2]

Then there is the type of tribunal known as the casual tribunal, in which an existing dispute is submitted to an arbitrator chosen by each of the parties, they, or the arbitrators so chosen, to select the additional arbitrator. As each of the arbitrators chosen is a partisan and is often paid for his service by the party appointing him, this type of tribunal is no more independent than would be a court that had advocates sitting as judges.

There is still another class of tribunal in which the arbitrators have very wide powers as to appointment of other arbitrators, as to making rules of procedure or as to fixing fees and expenses. To what extent these tribunals attain a measure of independence will depend, first, upon the manner of selecting the arbitrators and, second, upon the rules which they adopt for the proceedings.

It would seem that any independence achieved by tribunals must come rather from the institutions that found them or the parties that create them than from the arbitration law itself, for the law does not consider the matter of independence. These laws provide a penalty, for partial or biased or corrupt awards may be invalidated, but whether this penalty is applied depends entirely

[2] See decision of Judge Thacher in matter of *U. S.* v. *Paramount Famous Lasky* (1930) 34 Fed. (2d) 984.

upon whether a party alleges this as a ground for upsetting the award by appealing to the courts.

Nor is there any aroused or educated public opinion to sustain independence of arbitration tribunals. Allegations of corruption in the courts arouse violent protests, because the judge is a public official; but similar allegations of corruption in an arbitration hearing provoke little discussion.

There are reasons for this differentiation in public opinion: The court is responsible to the people who pay taxes to support it and elect the judges, while the tribunal is responsible only to the parties, who pay their own costs. The court is public in its proceedings, affecting, through its decisions and publicity, wide questions of public policy and public welfare, while the arbitral proceeding is private and presumably affects only the parties. The decisions of courts give rise to precedents, which other courts follow; the decisions of arbitrators, relating more to facts than to law, are not ordinarily used as precedents.

However fundamental these differences of function may prove to be, courts and tribunals have this principle in common: that if either is lacking in integrity and independence of control by special interests or arrives at its decisions by corrupt practices, it ultimately, as an institution, forfeits the confidence and respect of the parties and of the public. It is also true that, however private and circumscribed is the influence of a tribunal, the public is adversely affected by having in its midst even a private tribunal that holds itself out to be adjudicative while violating the established principles of a judicial proceeding.

By what standards may we approach the problem of freeing arbitral tribunals from special interests and what control, if any, may be substituted in their place? For purposes of further discussion, it may be said that the independence of tribunals will be attained in the following direction: [3]

1. By the abolition of the appointment of an arbitrator by each party and the substitution of the method of mutual selection of all arbitrators.[4]

[3] In the establishment of its national system of tribunals, the American Arbitration Association has undertaken to apply these standards in its entire practice through its rules; but is limited by an uninformed public opinion that is not yet sure it is important to have independent arbitral tribunals.

[4] On this point the Court of Appeals of the State of New York has unmistakably expressed its opinion. It said: ". . . . the practice of arbitrators

2. By the appointment of a permanent administrative body, acting under rules which place beyond their own power the ability to accede to popular or special demands from either the founding body, the parties or commercial interests.

3. By the adoption of standard rules which the parties themselves and the arbitrators must follow; these rules to be prepared by an independent outside agency and which rules cannot be jockeyed about or changed without the consent of the body making the rules.

4. By placing under independent control the fixing of fees and expenses and methods of payments so no financial arrangements will exist between any arbitrator and any party, thus eliminating the bought or hired arbitrator.

5. By the inauguration of discussion and education which will bring to bear upon tribunals an informed public opinion resulting eventually in a permanent type of independent tribunal which will be recognized as such in American practice.

ARBITRATION OF EARLY PATENT DISPUTES

BY

P. J. FEDERICO *

THE early patent laws of the United States provided for the compulsory arbitration of disputed questions arising in the granting of patents. For a period of over forty years the right to a patent, when two or more rival inventors simultaneously applied for a patent for the same invention, was decided by a board of arbitrators appointed under the statutes.

One of the important questions considered by the first session of the first Congress, which met in 1789 after the adoption of the Constitution, was that of enacting suitable patent laws, in accordance with the constitutional power " to promote the progress of science and useful arts, by securing for limited times to authors

---

of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity, and should possess the judicial qualifications of fairness to both parties so he may render a faithful, honest, and disinterested opinion." (*Matter of American Eagle Fire Ins. Co., et al* v. *N. J. Ins. Co.* 1925, 240 N. Y. 398, 405.)

* Editor, Journal of the Patent Office Society.

and inventors the exclusive right to their respective writings and discoveries." [1] President Washington's first message to Congress recommended, among other things, the encouragement of the exertions of skill and genius in producing inventions.[2] The patent law which was enacted vested the power to grant patents to inventors in a board of three—the Secretary of State, the Secretary of War and the Attorney-General of the United States.[3] This board, whose members were Thomas Jefferson, Henry Knox and Edmund Randolph, examined each application and determined whether a patent should be granted; there was no appeal from their decision.

The possibility of several different applicants for a patent for the same invention was not mentioned in the patent act and no particular procedure provided for such a contingency. Consequently, the patent board was considerably disturbed when petitions for patents containing conflicting claims were filed by four different inventors. John Fitch, James Rumsey, John Stevens and Nathan Read each applied for overlapping and conflicting patents for steamboats and other inventions relating to steam engines. Several hearings were held before the board, and various suggestions, such as granting the patent to the first applicant, or appointing referees to settle the matter, were proposed and discussed but not adopted. Patents were eventually granted to each contestant on August 26, 1791, which straightened out most of the tangle, but probably left a question of priority undecided between Fitch and Rumsey. The contest between these two was bitter; they had already fought before several state legislatures in the acquisition of state patents, and in a battle of pamphlets.[4]

The duties imposed on the three high government officials by the patent act required too much of their time, and three different bills, revising the law to relieve them of the burden, were introduced at successive sessions of Congress. The second of these followed the steamboat conflict and provided that cases of interfering claimants for patents were to be decided by a jury trial in the Supreme Court of the United States, or, if the parties

[1] Art. 1, Sec. 8.

[2] Annals of Congress, 1st Congress, 2nd Session, Page 933.

[3] 1 Statutes at Large 109, Approved Apr. 10, 1790. See *The First Patent Act*, 14 J. P. O. S. 237, April 1932.

[4] *Operation of the Patent Act of 1790*, 18 J. P. O. S. 237, April 1937.

resided in the same judicial district, in the circuit court for that district.[5] The act, which became law on Feb. 21, 1793, contained a different section relating to interferences. Cases of interfering applications were to be submitted to the arbitration of three persons, one to be chosen by each applicant for patent and the third by the Secretary of State. Failure or refusal to select an arbitrator resulted in the issuance of the patent to the opposing party. If there were more than two interfering applicants, the Secretary chose all three arbitrators if the parties could not unite in an appointment of the three.[6]

Owing to the total destruction of all Patent Office records by a fire which occurred in December, 1836, it is impossible to give a complete account of the operation of the system of deciding contested cases in the Patent Office by arbitration. But some picture can be obtained from a few meager records, and some unofficial sources.

The first arbitration under the new act occurred the same year it was passed, but the only record of it appears to be a note appended to a list of patents. A patent was granted to John Clarke on December 31, 1793, and opposite this entry appears the statement, "Disputed claim for a machine to work in a current of water, etc., decided in favor of John Clarke".[7]

Only one decision of a board of arbitrators has been found.[8] This brief decision, dated 1813, reflects an harmonious disposition of the case. The participation of famous personages and the fact that the invention involved played some part in the history of the steamboat, concur in making the document one of unique interest. The rival claimants for patents were Robert Fulton, himself, and one John L. Sullivan of Boston. Fulton's petition for patent was filed June 11, 1813. The petition refers to Fulton's two prior patents for steamboats and states further:

> "That in the prosecution of his experiments on the navigation by steam on the largest scale, he has made further discoveries and produced further inventions, extending to an incalculable degree, the bene-

[5] *Outline of the History of the United States Patent Office*, 18 J. P. O. S., July 1936, Page 79.

[6] 1 Statutes at Large 318, sec. 9.

[7] Letter from the Secretary of State accompanied with a list of names of persons who have invented any new and useful art, machine, manufacture or composition of matter, etc., Feb. 22, 1805, Page 8.

[8] In *"A Reply to Mr. Colden's Vindication of the Steam-Boat Monopoly"*, by William Alexander Duer, Albany, 1919. Appendix pages xxvi and xxvii.

fits of his original discovery and invention, of the effectual and practical method of navigation by steam, for which he now prays, that a patent may be granted to him according to law.

These inventions consist principally in the combination and connection of several boats, constructed and connected in a manner so as to be propelled or drawn forward by one boat, containing a steam engine with the machinery necessary to the propelling of such steam-boat. This invention, consisting essentially in the separation of the steam-engine and of the boat containing the same, from the boat or boats which carry the passengers and cargo, without however, its being necessary to exclude from the boat carrying the steam-engine, some part of the passengers and cargo. By which invention, the weight being distributed over a surface of water, which may be indefinitely increased, the draft of the water necessary to carry the same may be indefinitely diminished, while at the same time, all the inconveniences, expense and liability to warp, which attend one boat of very large dimensions and great length, are avoided. The best manner of executing which invention will be more fully described in the specification which your petitioner is about to deposit in your office." [9]

In other words, the idea of using a steam tow boat!

Fulton chose Eli Whitney, the famous inventor, as his arbitrator; Sullivan's second was Theodore Dwight, newspaper publisher and cousin of Aaron Burr, and the referee appointed by the Secretary of State was James Hillhouse, lawyer, one-time Senator from Connecticut and treasurer of Yale College.

The decision, awarding priority to John L. Sullivan, was rendered on December 16, 1813—within six months of the time when Fulton had applied for a patent.

Sullivan's patent was granted April 2, 1814 with the title, "Steam tow-boat and warping windlass". No copy of the patent has been found in the Patent Office.[10]

The Act of 1793 was in force for 43 years and about 10,000 patents were granted under this act, but the number of arbitrations during this period appear to have been very few, probably less than fifty. The records surviving are meager. From some early letters still in the Department of State it appears that, when two applications for patents for the same invention were discovered, the Superintendent of Patents would write a letter to the

[9] *Ibid.* Appendix pages xxv and xxvi.

[10] It is interesting to note that the State of Massachusetts extended the patent to Sullivan by granting him the exclusive right to use his invention on the Connecticut River for twenty-eight years, from and after the expiration of his Federal patent for the same invention. Sullivan's name appears as the inventor of a number of inventions in steam-boats.

Secretary of State notifying him of the fact. Presumably the Secretary then conducted the correspondence regarding the appointment of arbitrators, and the arbitrators, once appointed, would proceed in their own fashion to hear the evidence and decide the case as they saw fit. At a later time sets of printed blanks, including notices of interfering applications to the several parties, notices to choose arbitrators and forms for the award of arbitrators, appear to have been used.

The arbitration system of deciding these cases was not a success in general, owing mainly to inherent defects in the patent laws. During this time patent applications were not examined but patents were granted on demand, to anyone who applied. This introduced some complication in the interference practice. The losing party could subsequently demand a patent and no one had authority to refuse it. This situation is illustrated by the case of *Stearns* v. *Barrett*.[11] Both parties applied for patents for the same invention, in 1808 or 1809, and they were required to select arbitrators; Barrett refused to appoint one and the patent was granted to Stearns, according to the law. Subsequently Barrett also obtained a patent, since there was no power to refuse him one. Stearns then sued Barrett in the district court in Boston, to have his patent declared invalid [12] and the trial was in effect an interference case before a jury. The verdict of the jury was so inconsistent that it was set aside on appeal and a new trial ordered. What happened then is not known, but the parties must have settled their differences amicably since they later obtained a reissue as joint inventors in 1818.[13]

In addition to the fact that the loser of an interference could still obtain a patent if he insisted, it was also possible for an interference to be contested between two parties requesting patents for an invention which had already been patented to someone else.

Since applications were not examined, they were usually pending only a very short time, which fact considerably decreased the number of interferences. The number was still further decreased by a peculiar interpretation of the law by Superintendent Craig (1829-35), which practically eliminated interferences; in

[11] 1 Robb's Patent Cases 97.

[12] Sec. 10 of the Act of 1793 provided for actions to repeal patents, to be brought by anyone within three years after the grant of the patent.

[13] *Barrett and Stearns* v. *Hall*, 1 Robb's Patent Cases 207.

fact there appears to have been not a single arbitration during his incumbency. In the eight years preceding 1834 there was only one interference. Mr. Craig did not consider two applications as interfering unless they were completed on the same day. If an application was filed complete in all its parts, including the fee, on one day, he considered it the same as patented on that day, since nothing remained to be done except the clerical work of making out the patent. Consequently, if another application were filed the next day for the identical invention, it did not interfere, in his opinion, and both patents would be granted. This practice was directly contrary to an official opinion of Attorney General Rush rendered in 1814.[14] Mr. Craig was eventually overruled by the Secretary of State shortly before his remarkable career as Superintendent of Patents was terminated.

The Patent Act of 1793 was so defective and led to so many abuses that the law was completely revised in 1836.[15] The principal change was in providing for the examination of applications for patents, with authority to refuse to grant a patent conferred on the Commissioner of Patents. With respect to interfering applications for patents, these were left to the decision of the Commissioner of Patents in the first instance. The Commissioner then had authority to refuse to grant a patent in those cases in which he decided that a patent should not be granted, and he also had authority to decide which of several rival claimants for a patent was entitled to it.

The decision of the Commissioner was not final, however, in either of these two classes of cases. An applicant for a patent, or the losing party in the case of an interference, if dissatisfied with the Commissioner's decision, could request the decision of a board of three arbitrators, called a "board of examiners". All three arbitrators were to be appointed by the Secretary of State for the purpose; they were to be disinterested persons, and at least one of them was to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appurtained. The arbitrators were to be under oath or affirmation for the faithful and impartial performance of their duty. Before a board could be instituted, the appellant was to pay the sum of twenty-

[14] 5 Op. Atty. Gen. 701.
[15] 5 Statutes at Large 117, Approved July 4, 1836.

five dollars, and each arbitrator was entitled to receive a sum not exceeding ten dollars in full compensation for his services.

The board was to be furnished with the opinion and decision of the Commissioner and with all necessary information. They were to notify all parties involved, of the time and place of their meeting, and the contestants could furnish such facts and evidence as they thought necessary. The board, or a majority of them, could reverse the decision of the Commissioner in whole or in part, and their decision was to govern further proceedings.

The decision of the board was final in *ex parte* cases, and also in the case of an interference between two applications; but in the case of an interference between an application and an unexpired patent, recourse to a court by means of a bill in equity was permitted.

It appears that there were no arbitrations in the years 1836 and 1837,[16] but there were a number in 1838. The Commissioner of Patents, in his report to Congress for the year 1838, indicates that great delay and trouble attended the operation of appeals to a board and that complaints had been made. It was construed that the appeal reopened the whole matter to the reception of additional evidence, which led to delays and expensive litigation. The compensation provided for the members was so small that few persons of requisite qualifications could be found who would consent to serve.[17] Hence, whenever an appeal was taken it was difficult to constitute a board. Furthermore, different individuals being appointed in different cases, their rules and methods of procedure were various and unsettled. The Commissioner recommended that the law be changed.

An act passed March 3, 1839, modified the appeals and transferred them to the Chief Justice of the district court for the District of Columbia,[18] in accordance with the suggestion of the Commissioner of Patents.[19] Thus arbitration passed from Patent Office practice, and was never again made part of the statutes.

[16] Patent Office Report, 1837, page 2.

[17] See Phillips, *The Law of Patents for Inventions*, Boston, 1837, pages 317-320, for a contemporary appraisal of the arbitration system of appeals. Phillips states that even a common laborer, assuming him to be competent, could hardly afford the time for a thorough investigation of a case at the rate of compensation specified by the statute.

[18] 5 Statutes at Large 353, Sec. 10, 11.

[19] Appeals from the Patent Office are now decided by the United States Court of Customs and Patent Appeals.

Interferences are, however, now often settled by private arbitration; but the manner in which this is done, and the extent of the practice, is beyond the scope of this paper.[20]

NOTES AND COMMENT

Arbitration as a Factor in Calendar Reduction. Increasing emphasis is being placed on the use of arbitration by lawyers whose cases appear on the calendars of the Municipal Court of the City of New York. This situation has resulted from the continuous assistance given by the American Arbitration Association in contacting those willing to cooperate and in obtaining the consent of opposing counsel to arbitrate. Active assistance has also been given by the New York County Lawyers Association, the Association of the Bar of the City of New York and the Brooklyn Bar Association.

Progress has been aided by communications from the President Justice of the Municipal Court to attorneys in cases in which one side has already consented to arbitration. In 1936, 1,830 letters were sent by the President Justice to such counsel, with the result that 330 cases were actually arbitrated and 660 cases were settled or discontinued during arbitration negotiations. Up to December 16, 1937, the President Justice of the Municipal Court has written 1,500 such letters, with 242 cases arbitrated and 848 settled or discontinued to date.

[20] It may be interesting to note that the Ontario Provincial Statutes of 1826 (7 Geo. IV, c. 5, s. 7) contained a section relating to the arbitration of patent interference cases, which was patterned after the contemporaneous United States law, and which was included in substantially the same form in the Federal Act of 1872. It was provided in the latter Act that in cases of conflicting applications for a patent the controversy should be submitted to the arbitration of three skilled persons, two of whom were to be chosen by the applicants, one by each, and the third by the Commissioner. The decision of this board of arbitrators was to be final as far as the granting of the patent was concerned. The arbitrators under paragraph 5, of section 20 of the Act of 1872, had power to subpoena witnesses and to have them produce such documents and evidence as they considered necessary for a full investigation of the matter and a fair decision. This Statute remained the law in Canada until as recently as 1935, when the Commissioner of Patents was made the court of first instance in patent interference cases, with subsequent appeal to the Exchequer Court.

In Brooklyn, members of the Arbitration Committee of the Brooklyn Bar Association are in daily attendance in the First District Court and successfully arbitrate 20 cases a week.

The volume of cases in the Municipal Court is so great that this very substantial work marks only a beginning of what might be accomplished were it to have the thorough and hearty cooperation of the Bar, for the Municipal Court disposes annually of over 630,000 cases.

The condition of the calendars reflects the efforts being made to reduce them:

The Non-Jury Trial calendars are in excellent condition. No delay whatsoever exists in any district in any borough with respect to Non-Jury trials. In many districts, cases noticed for trial may be reached on the Day Calendars and be disposed of within a period of two or three weeks. No delay exists in the trial of jury cases in the Boroughs of the Bronx, Queens and Richmond, nor in the trial of Commercial Jury Cases in the Boroughs of Manhattan and Brooklyn.

Congestion still exists in the Tort Jury Calendar in the Boroughs of Manhattan and Brooklyn. Substantial progress, however, is being made in the reduction of this congestion in Tort Jury cases in the Borough of Manhattan. Progress is also being made in this calendar in the Borough of Brooklyn.

As of December 31, 1936, there were 12,378 cases pending on the Tort Jury Calendar in the Borough of Manhattan. As of November 30, 1937, there were 5,539 cases pending on this calendar, or a reduction of over 50 per cent. In the Borough of Brooklyn as of December 31, 1936, the number of cases pending on this calendar was 16,028. On November 30, 1937, there were 10,466 cases pending, or a reduction of approximately 30 per cent.

As of December 31, 1936, there was a waiting period on the Jury Tort calendar in the Borough of Manhattan of approximately 17 months. As of November 30, 1937, this waiting period was reduced to approximately nine months. The waiting period on the Tort Jury Calendar in the Borough of Brooklyn as of December 31, 1936, was approximately 27 months. As of November 30, 1937, this waiting period was approximately 22 months.

Arbitration of cases pending upon these trial calendars has played its part in aiding the material reduction of the pending cases. It should be borne in mind that the greater part of the

disposal of pending cases in the Municipal Court by arbitration is that done at the offices of the American Arbitration Association. This permits the Justices of the Court to dispose of other cases in which arbitration cannot be effected.

It is only by united effort that the benefit of arbitration can be brought to the attention of the Bar. In this work the American Arbitration Association, the New York County Lawyers Association, the Bar Association of the City of New York and the Brooklyn Bar Association have been consistently helpful and cooperative. What has been accomplished has indicated what is possible.

PELHAM ST. GEORGE BISSELL.*

Arbitration of Disputed Medical Fees. The Arbitration Division of the Compensation Insurance Rating Board, acting in cooperation with the Medical Society of the State of New York, has received for its calendar from January, 1937, until the time of this writing 1,044 cases covering 967 disputed medical and 77 disputed hospital bills which have been rendered for the care and treatment of injured persons under the provisions of the New York Workmen's Compensation Law. Fifty-five sessions were held, in the course of which 652 awards were made, 207 were settled by agreement of the parties prior to the hearing, and 185 remain on the calendar to be disposed of.

Each Arbitration Committee comprised a group of four physicians specially selected from the panel because of their knowledge and experience in the treatment of industrial cases. These physicians have willingly given their valuable time in order to perform an essential service as part of the program provided by the amended Section 13 of the Workmen's Compensation Law. As a result of these arbitration proceedings doctors who have rendered honest bills have received full value for their services, while bills of questionable fairness were reduced to amounts consistent with the facts developed at the hearings.

To date the arbitration sessions have been confined to the counties of New York, Bronx, Kings, Queens, Richmond, Nassau, Rockland and Westchester. Arbitration proceedings in other parts of the State are held in abeyance pending the promulgation of a Minimum Fee Schedule for the upstate area.

* President Justice of the Municipal Court of the City of New York.

Forty-six insurance companies and 16 self-insurers have taken part in the arbitration proceedings and 38 hospitals have submitted their cases to the Arbitration Committee. The issues raised by the defendants in the proceedings have included the following questions: necessity for consultation with the specialists, duplication of X-rays, excessive charges for operations, treatment for conditions not due to occupational injury, duplication of laboratory tests, treatment rendered outside of the doctor's qualifications and excessive per diem charges by the hospitals.

It is interesting to note the large number of cases that have been settled prior to the hearing, but after they have reached the calendar. The reason may be due to the willingness of the doctor to come to terms with the company or the employer rather than to expose his case to public scrutiny.

During the first six months of operation sessions were held twice weekly. At present one session a week appears to be sufficient. The Board has two groups of arbitrators who are able to dispose of 14 cases in an afternoon's session. The total amount of disputed bills was $51,603.71. The awards by the Arbitration Committees have reduced the sum to $28,891.34.

While it is premature to draw definite conclusions, the general opinion is to the effect that the procedure serves to render justice by granting speedy awards without protracted litigation. The Arbitration Committees, being composed of medical men, are in a good position to deal justly with the members of their profession.

LEON S. SENIOR.*

Automobile Dealers Urge Arbitration. The Automobile Dealers' Association of Indiana has inaugurated a movement within the industry to explore the possibilities and advantages of a system of arbitration to remove the more serious problems which now beset the automobile retail business and which are beyond the control of any individual dealer or manufacturer. Believing, however, that the cooperation of these groups can solve these problems, the Association recently adopted a resolution addressed to the Automobile Manufacturers' Association, the National Automobile Dealers' Association and the Federal Trade Commission, which calls for the establishment of a national board of arbitration for the purpose of deciding all questions of equity that may

* General Manager, Compensation Insurance Rating Board.

be brought to its attention as existing between automobile dealers and between dealers and the manufacturers. The plan was discussed at a meeting of the interested groups on December 13, which was attended by representatives of the groups above mentioned and of the Ford Motor Company, American Finance Conference, National Association of Sales Finance Companies, the Hoosier Association of Finance Companies and the National Automobile Distributors' Association to consider, primarily, whether activities looking to the establishment of the arbitration plan shall be continued or whether the industry should devote itself to legislation to correct the existing troubles.

The plan proposed by the Indiana group calls for a national board of twelve arbitrators, four to represent the leading manufacturers in the industry, four manufacturers' representatives and four to be selected by the Federal Trade Commission with absolute authority. The decisions of this board would be final with respect to any matter coming before it and its authority would arise under uniform clauses providing for arbitration to be incorporated in every franchise contract between dealers and manufacturers.

Jewish Arbitration Court for Detroit. The Jewish Community Council of Detroit has created a Committee on Arbitration, with Judge Charles Rubiner as Chairman, to work out the details of a plan for the establishment of a Jewish Arbitration Court to encourage the amicable adjudication of differences between individuals and organizations. The Court will operate similarly to those now functioning successfully in a number of other cities, notably the Jewish Counciliation Court of America, the work of which was described in the preceding issue of the JOURNAL.[1]

Landlord and Tenant. A movement to establish a board of arbitration and conciliation to handle disputes arising between landlords and tenants was launched at a meeting of the housing section of the Welfare Council of New York City on November 11. The recommendation was made by Stanley M. Isaacs, President of the United Neighborhood Houses, who advanced the view that rent problems should be handled by an administrative agency appointed by the Mayor, rather than by the courts. It was Mr.

[1] See Vol. 1, No. 4, p. 357.

Isaacs' opinion that the courts had set unsound rules in deciding the justice of increases in rent, one such being that the test of reasonable rent was the return on the value of the building, whereas, according to Mr. Isaacs, the value of the building should depend on its income.

Policeman as Mediator. A three weeks' rent strike of sixty-six families living in three apartment houses in Brooklyn, New York, which followed the eviction of three families for non-payment of rent, was recently settled through the mediation of a policeman, who sought this method of settling a serious police problem on his hands. The strike over the evictions quickly developed into a dispute between the remaining tenants and the owners concerning redecorating, repairs, increases in rentals and other issues. When picketing followed and associations representing the tenants and the landlords were unable to reach agreement, Capt. John McQueeney invited the contestants to meet in his office to discuss their grievances. After four hours of negotiation, the parties in controversy arrived at a mutually satisfactory adjustment which included the payment of a small increase in rental by tenants, the making of repairs and reinstatement of the evicted tenants on the part of the landlords and an agreement that all future difficulties would be arbitrated before the recurrence of a strike.

Court Permits Infants to Arbitrate. The Arbitration Rules of the Municipal Court of the City of New York, which have heretofore excluded infants and incompetents from arbitration, have been amended so as to permit either of such parties to submit a pending action or controversy to arbitration. Permission to arbitrate, in the case of an infant, is obtained through approval by the appropriate court of a petition made by the general guardian or the guardian *ad litem* and, in the case of an incompetent, through a similar petition by the committee of the incompetent.

Arbitration Tribunal's Activities in 1937. During the year ending December 31, 1937, a total of 2113 matters were submitted for adjudication to the Tribunals of the American Arbitration Association. 26 of these matters involved controversies between employers and employees arising out of agreements between employers and unions, a special Tribunal having been created by

the Association last October to handle such disputes.[1] The remainder were civil and commercial matters, submitted for arbitration under the Rules of Procedure of the Commercial Arbitration Tribunal.

These cases were disposed of as follows: 486 were concluded by awards of arbitrators; 1014 were settled directly by the parties during the negotiations for arbitration, without the necessity for a hearing, and 56 were withdrawn by the parties. The remainder were closed by the Association upon the refusal of one of the parties to consent to arbitration or were pending at the end of the year.

Dealer Relations Board for General Motors. Announcement of the creation of a Dealer Relations Board, to insure equitable rights for all of those who sell General Motors Corporation products, was made on January 5 by Alfred P. Sloan, Jr., chairman of the Corporation. The Board will consist of Mr. Sloan as chairman; W. S. Knudsen, president of the corporation; Donaldson Brown, vice-chairman of the board, and John Thomas Smith, vice-president in charge of legal matters.

The functions of the Board will be to provide an organized opportunity, through a definite operating procedure, whereby any dealer holding a selling franchise may obtain a judicial review of any administrative decision which, according to that dealer's belief, importantly affects his equitable rights.

THE ANCIENT ARBITRATOR

> An arbitrator is an arbitrary judge. This is the true etymology, which we trace back to the Roman law; for, in the Institutes which bear the title of "The Elements of Justinian," the *discretionary judge* is what we call an arbitrator; and the actions depending on his arbitration are called "Arbitrary." An arbitrator was one of the most ancient and honourable of judges; for we frequently read in the history of Rome, that arbitrators were appointed to settle differences between hostile kings, who were allies of the Roman people.—*Stevens on Arbitration* (1835).

[1] See announcement of the Voluntary Industrial Arbitration Tribunal in the October issue of the JOURNAL, p. 403.

AMERICAN INDUSTRIAL ARBITRATION[1]

ARBITRATION IN THE ENTERTAINMENT FIELD

BY

FRANK GILLMORE *

IF there is one distinctive contribution Equity has made to the entertainment field it is the principle of arbitration for the settlement of disputed points in the performance of its standard contracts.

Prior to the appearance of the Actors' Equity Association, the theatre had been, and perhaps it still is, potentially the most disputatious and litigious of all fields of human endeavor. Certainly, to that time, the producing managers, who are the employers, had definitely preferred and had come to depend upon settlement of such disputes through legal action, whose lengthy, costly and cumbersome processes were all in their favor.

Union labor, on the other hand, in those instances where it had achieved the requisite power, tended to formulate its demands and debate them if necessary, but was always prepared to fight it out to the end when it had actually gotten down to rock bottom terms.

But Equity, from its inception in 1913, has been willing to submit its cases to impartial judges or boards of arbitration which, neglecting the complicated rules of court procedure, strive to ascertain just what has happened and then, on the basis of the specific language of the contract, as construed by theatrical cus-

[1] References to Industrial Arbitration in foreign countries will be found in the Section on International and Foreign Arbitration.

* Executive Director, Associated Actors and Artists of America.

tom, hand down awards binding on both parties through prior agreement. It is only fair to add that the primary responsibility for this early stand can be attributed to our Chief Counsel, Paul N. Turner.

And Equity was crusading for such a procedure ten years before there was an American Arbitration Association, and at a time when, as far as it knew, there was no other group of organized workers willing to submit its actions to such discipline.

It is, of course, a rule of conduct to which it is possible to subscribe only when one can enter court with reasonably clean hands, and Equity has been by no means willing to demand the arbitration of all claims submitted to it by its members, some of which are obviously not deserving the dignity of arbitration. But, by a scrupulous choice of cases in which it has made such demands, Equity's record of arbitration shows victories in more than ninety-five per cent. of all the cases which have gone to arbitration.

Equity was four years old before it could even get the managers to sit down with it and discuss the terms of a Basic Agreement and standard minimum contracts. But one of the minimum and most basic of the conditions of that contract, when it was finally signed by both parties on October 2, 1917, was an arbitration clause for all disputes which might arise from the contract.

It might be asked in all sincerity why Equity was so eager for such a provision so far in advance of all the other organized groups. Setting aside, for a moment, Equity's real desire to bring justice into a distressed and unsettled field, it was the very conditions in that field which made Equity feel that arbitration was an absolute necessity.

Observe what would happen to a case in which both parties had gone to the courts for settlement. In New York State, in which the majority of the cases were likely to arise, the court dockets were so crowded that several years might elapse between the filing of a claim and its coming to trial.

But, when the case was finally called, the actor who had filed the claim might be playing anywhere in the country; his witnesses would certainly be scattered all over the map and there would be little likelihood that he could reassemble them. The manager, however, would be on hand, since he was a relatively permanent entity, his records would be available and his witnesses, members of his production or office staff, would probably be in court to

substantiate his contentions. In such a set-up the actor would either have to let the judgment go by default or struggle against exceedingly heavy odds in the presentation of his case.

Arbitration, though, could be arranged speedily, while the production was still running or, if it had closed, before the members of the cast had gone out with other shows and the hearing itself would be a matter of hours or, in complicated cases, days instead of weeks as in the courts.

And so from that first contract more than twenty-one years ago, every subsequent contract issued by the Actors' Equity Association has not only contained, but has featured, an arbitration clause.

At first these arbitrations were held before boards to which each party, or Equity representing the actor, nominated one member and the two thus chosen elected a third. The great difficulty was obtaining impartial arbitrators, for the two appointed by the disputants often seemed to regard themselves as advocates for the parties they represented rather than as disinterested judges. A further difficulty with this system was that, just as somebody won every arbitration, somebody also lost it and the loser was apt to take it out on his own representative. Designed to end all hard feelings, it sometimes started them all over again.

And so Equity was quite content, when the American Arbitration Association was organized in 1926, to turn its cases over to that impartial tribunal. Equity was the first organization of its kind to make a practice of submitting all its questions of contract to the American Arbitration Association, and that primacy was twice recognized publicly by the Association,—in the presentation of its Commercial Peace Medal, in 1931, to me as representative of Equity; and again at the tenth anniversary dinner, in February 1936, when Equity led the roll of the years in responding to the call of the Chairman of the Arbitration Committee of the Association.

In the more than twenty years in which arbitration has played such a leading rôle in Equity's policy some very interesting cases, ranging from the gay to the highly dramatic and significant, have gone through the arbitration mills.

Perhaps the most important of these, from Equity's standpoint, was that held during the summer of 1921, when the question of Equity's right to institute an Equity Shop in companies outside

the Basic Agreement with the Producing Managers' Association, which had been challenged by the latter organization, was laid before Federal Judge Julian W. Mack, who had agreed to serve on this occasion.

If the managers' contention in this case had been sustained it would have meant the delay of Equity's campaign for at least three years and might have meant the breakdown of the effort in its entirety. The decision, however, was a sweeping victory for Equity, which ended with the declaration that: "The Equity Shop plan and the resolutions and instructions of the Actors' Equity Association with respect to this plan, ... are not in violation of the agreement . . . . and are not in violation of law or sound public policy." That was a decision worth winning.

But perhaps the arbitration which is most usually remembered was that affecting the claim of the "Coquette" company against Jed Harris and which has immortalized the small daughter of Charles McArthur and Helen Hayes as "The Act of God Baby", a title she will probably bear the rest of her life.

The question involved was much less colorful originally. It concerned the claim of five actors in "Coquette" for two weeks' salary due to the abandonment of the second season tour of the company because Miss Hayes, aware of her approaching motherhood, was disinclined to undertake the rigors of a road tour. The management, however, took refuge behind a clause in the contract which excuses non-payment of actors in the face of "fire, accident, strikes, riot, and act of God or the public enemy." A baby, they argued, was an Act of God. For some days every newspaper in the country attempted to get Equity to state for the record whether the bearing of a child was an Act of God or not. For a while it appeared that theology was likely to become an important adjunct to the law of contracts.

But when it came to the arbitration itself, Equity pointed out that the actors had been engaged for the play and that no mention of Miss Hayes' presence in the cast was contained in their contracts. It was within Mr. Harris' rights to decide that he would not tour "Coquette" without Miss Hayes, but at the moment when he made that decision and had two or more alternatives from which to choose he could not claim that he had been helpless in the matter of the closing of the company.

The award was in favor of Equity and the five players, who received the salaries they had claimed and presumably were satis-

fied. Mr. Harris received marvelous publicity for himself and his organization, publicity that could hardly have been bought at any price, and felt, likely enough, that he had gained far more than he had lost by it. The McArthurs had their child. The newspapers had a field day with a story the like of which does not often wander up journalistic alleys. The Arbitration Association had a very pleasant time with it, on the whole. And Equity—had a ringing headache over the whole matter.

In between such extremes Equity has to submit a great many routine cases concerned with the business dealings involved in the ramifications of a peculiarly complex and personal form of endeavor. For twenty years arbitration has stood the tests imposed upon it by such cases.

In this period, following and as a result of Equity's crusade for arbitration, the principle of peaceful adjustment of disputes has extended to the Chorus' Equity Association, Equity's affiliate covering the members of the chorus, and is spreading throughout the entire entertainment field.

During the past year, that young and lusty member of the entertainment family, the Screen Actors' Guild, comprising the thousands of actors on the screen, concluded an agreement with the motion picture producers covering the terms of employment of actors engaged in the industry, and providing for the arbitration of disputes, one of the basic principles involved in the recognition of their Union. The Screen Actors' plan provides for boards of arbitrators made up of representatives appointed by each side, with the impartial member of the board named by the American Arbitration Association. The Guild, of which Robert Montgomery is President and Kenneth Thomson, Executive Secretary, has agreed that the arbitration provisions are to run for a period of ten years.

The still younger member of the family, the American Federation of Radio Artists, of which Eddie Cantor is President and Mrs. Emily Holt, Executive Secretary (both of whom are well-known for their zeal in the cause of arbitration) is building along arbitration lines; and the American Guild of Musical Artists, of which Lawrence Tibbett is President, uses arbitration clauses in a number of the contracts of its members, providing for the arbitration of differences under the auspices of the Arbitration Association.

Such a rapid growth of arbitration in the entertainment field and the eminently satisfactory solution of the problem of unadjusted disputes would not have been possible, however, without the devoted, efficient and impartial services of the men and women on the panels of the American Arbitration Association who have served as the arbiters in Equity's disputes. I could not conclude this article without extending to them and to the officials of the Association, with whom we have worked so closely for so many years, our sincere admiration and respect for their work.

COMPULSORY INDUSTRIAL ARBITRATION IN THE PHILIPPINES

By act of its National Assembly, the Philippine Islands Government has established a Court of Industrial Relations.[1] Under this Act the President appoints one judge with the consent of the National Assembly to preside over the Court. His jurisdiction extends over the entire Philippines and includes the consideration and investigation of any dispute arising between or affecting employers or employees or laborers, and landlords and tenants and farm laborers, and the regulation of the relations between them, subject to the provisions of the Act.[2]

The Court has power to deal with strikes and lock-outs where the number involved exceeds thirty and provided the dispute is submitted by the Secretary of Labor; or by any or both of the parties to the controversy and certified by the Secretary of Labor as existing and proper to be dealt with by the Court. The issue must be stated in writing and with such submission the intervention of the Secretary of Labor ceases. The Court either before or during the hearing is authorized to endeavor to reconcile the parties. If any agreement as to the whole or any part of the dispute is arrived at, a signed memorandum thereof is filed with the Court and has the same effect as the Court's decision.

Minimum wages and maximum rentals are also within the scope of the Court. Whenever conditions in a given industry or a given locality warrant and in the interest of public welfare and the promotion of industrial peace and progress, the President shall

[1] Commonwealth Act, No. 103, (1937).

[2] See also Compulsory Arbitration Law passed in British Columbia, p. 67.

direct the Court to investigate the facts and prevailing conditions with a view to establishing minimum wages or maximum rentals.[3]

For the purpose of making its jurisdiction effective the Court has power to adopt rules of procedure, to administer oaths, to issue subpoenas, to require the attendance of parties and witnesses, to obtain the production of documents and statements, to hold hearings (even in the absence of a party who has been duly notified to appear) and to appoint assessors upon petition of a party. The Court is also authorized to appoint Boards of Inquiry in different localities to assist the Court. The method of their appointment and their duties are detailed in the law. The Court also has the alternative power of referring the matter to a public official selected by the Court, in order to expedite settlement. These officials may, in turn, appoint assessors. The function of officials and assessors is to investigate, report and recommend to the Court. The Court, or any person authorized by it, may inspect any labor establishment or premises and any work, implement, machine or appliance.

The award by the Court is not restricted to the specific claim, but may include any matter which the Court deems necessary to the settlement of the dispute. In cases of strikes or lockouts, judgment shall be entered on the award which is final, except that in any case involving a question of law an appeal may be taken to the Supreme Court by a party aggrieved by the decision.[4] An award is effective during the time specified in the award; in the absence of any provision either or both parties may terminate its effectiveness after a three-year period; provided the Court has not modified nor reopened nor set aside its award. The Court interprets its own award upon the application of a party.

In every contract of employment or tenancy, whether oral or written, is the implied condition that when a dispute has been submitted to the Court and pending its decision, an employee, tenant or laborer shall not strike or walk out when enjoined by the Court after a hearing, and if he has done so, shall return on order of the Court; and if they fail to return the Court may authorize the employer to engage or accept other employees or tenants. The

[3] Copies of this law will be furnished on request, for the specifications of what the Court shall take into consideration in fixing such wages and rentals are of very real significance in avoiding future disputes.

[4] It is not explicitly clear from the law whether appeals may be taken on questions involving wages; and THE JOURNAL is seeking further information on this point.

employer is also bound by the implied condition not to accept other employees without authorization by the Court and shall permit the continuation of employees and tenants pending the decision. Employers are expressly prohibited from engaging strike-breakers within fifteen days after the declaration of a strike; and it is also unlawful for them to discharge or discriminate against any employee or laborer because he has testified or is about to testify in any proceeding before the Court.

Legal enforcement of the contract and award is provided by imposing both civil and criminal liability. Non-compliance with any of the terms of the agreement or of the award after it has become final may subject the offending party to liability for damages to be recovered in a civil action. Any violation of the provisions of the Act or of any order or award of the Court shall be punished by a fine or imprisonment not exceeding one month, or both, in the discretion of the Court. Any person who induces another to such violation shall be punished by a larger fine and/or longer imprisonment as the Court may determine.

A PLAN FOR ADJUSTING LABOR DISPUTES *

BY

CHARLES A. PROSSER [1]

FORCE never settles anything, particularly labor controversies. The time is passed when labor controversies can be regarded "as none of the public's business." Refusal of either party to submit issues in dispute to fair adjustment procedure leaves the public with no recourse other than to believe that force is desired. Both employers and labor must recognize the mutuality of interest as the basis for the peaceful adjustment of differences. The fundamental principles of a plan for the peaceful adjustment of labor disputes are outlined in this article, as presented at a conference held in Minneapolis, early in April, 1937, attended by delegates from representative commercial and community groups throughout the state. Details of the plan as to organization and procedure would need to be changed to meet the varying conditions in different localities, but the fundamental principles have general application.

* Reprinted with permission from *Minneapolis* for April 28, 1937, official bulletin of the Minneapolis Civic and Commerce Association.

[1] Director, Dunwoody Industrial Institute, Minneapolis.

THE PLAN

I. *Administration.* 1. An administrative board, the employer and labor members of which are to be agreed upon respectively by the employer and employee organizations. (An alternative—appointment by the senior judge of the district court or by the mayor of the municipality.)

II. *Fundamentals Necessary to Success.* 1. All organizations of employers pledge themselves and their membership to conform to the plan.

2. All organizations of workers pledge themselves and their membership to conform to the plan.

3. Public officials pledge themselves publicly to support the plan.

III. *Purpose of the Board and Plan.* 1. To promote industrial peace by providing the service through which employers and employees can adjust their differences and if possible arrive at a peaceable settlement. The policies, procedures, rules and regulations of the board for the performance of this service to be made public for the information of all concerned.

IV. *Principles to be Embodied in Rules and Policies.* 1. No lock-out by employers or strikes by employees until the mediation services of the board have been asked.

2. Failure of such mediation to leave each party as free as it was at the outset to utilize any other agency.

3. The parties to any labor difficulty to be free to adjust it without using the services of the board; but should either party resort to strike or lock-out without having used the services of the board, the latter would publish this fact.

4. If mediation services of the board fail to bring about an adjustment, the board to hold itself free to publish a statement defining the matters in dispute and if necessary the conflicting claims regarding them.

5. The board to act always on the principle that the contending parties should settle their own differences and that the role of the board is only that of a friendly, unbiased mediator seeking to be of help to both parties in reaching a settlement.

6. Wherever arbitration by the consent of both parties is resorted to under the auspices of the board, the arbitrators to be selected only by the contending parties. No arbitration proceed-

ings to be entered into unless and until the representatives of both parties agree in writing to abide by the decision.

7. The board to have no authority to require either party to carry out the provisions of any settlement made, but one of the conditions for the use of its services to be that the terms of any settlement must be committed to writing and filed in the office of the board, which would be free to publish the terms of such settlement for the information of the public.

8. According to varying conditions, the written account of the settlement terms would take the form either of a joint agreement signed by both parties through their representatives or of the same stipulations in two documents each signed by one party.

9. The records of the board not to be public records and public statements of the board to be made only in writing by its chairman.

10. Because they are issues that cannot be settled by arbitration or mediation, the board should not undertake to adjust any issue involving union recognition, the closed shop, and the open shop.

V. *Indispensable Conditions.* Agreement by organizations of employers and their memberships, and organizations of workers and their memberships that:

1. No strike would be called by any group of employees until the following steps have first been taken:

(a) The complaints of such employees have been presented to the employer in writing.
(b) A request has been made to the employer for a conference between the representatives of such employees and the employer.
(c) The request has been refused by the employer.
(d) The two parties have failed to agree after such a conference.
(e) The employees after such disagreement have submitted their case to the board and asked it to take action.
(f) The board has offered its services of mediation to the employer.
(g) The employer has declined them.
(h) Notice that a strike will be called after a certain number of days has been sent to the employer.

2. No lock-out would be called by an employer until these steps have first been taken:

(a) The employer has made complaint to his employees.
(b) A conference has been requested between the employer and representatives of his employees.
(c) The request has been refused by these representatives.

(d) The two parties have failed to agree after such a conference.

(e) The employer after such disagreement has submitted his case to the board and asked it to take action.

(f) The board has offered its services of mediation to the representatives of the employees.

(g) The representatives have declined them.

(h) Notice of lock-out after a certain number of days has been sent to these employee representatives.

3. The terms of any adjustment would be faithfully carried out.

4. If a strike is finally called, the following principles and policies would be observed:

(a) Picketing would be only of the kind permitted by law.

(b) No destruction of property.

(c) Employees who desire to work to be free to pass in and out of the plant without interference.

(d) No interference with the receipt of material or shipment of product by the company.

5. When the strike is over all employees on strike who have not violated the law to be returned to their respective jobs without discrimination. Employees who refuse to strike to be free from molestation.

NOTES AND COMMENT

The Thirty-Years' Peace. On December 10 the arbitration agreement which has existed in the printing trades for a period of more than 30 years was continued in Washington when George L. Berry, President of the International Printing Pressmen's Union, and James G. Stahlmann, President of the American Newspaper Publishers Association, renewed the arbitration agreement which goes into effect on January 1, 1938, and continues for five years. After signing the agreement, the chief executives of the two organizations called the attention of those attending the ceremonies, including government officials, publishers and union leaders, to the fact that in a labor-troubled world here is a combination of employers and employees who have succeeded in maintaining an amicable understanding which is entering its fourth decade.

Arbitrators Award Pay Increases to Telegraphers. A board of arbitration was convened on December 10 to determine a dispute arising in the newspaper publishing field between the Commercial

Telegraphers' Union and the United Press. The arbitration board, headed by Roscoe H. Johnson, former President of the CTU, handed down an award recommending a new contract covering hours, wages and working conditions, under which there will be a $5 per week horizontal increase for printer-operators, 43½-hour work week, maintenance men and radio operators included in the closed shop agreement, three holidays instead of two and a 17-month contract, with a time limit set during which both parties may accept or reject the agreement.

Keeping the Peace in New York City. Laundry workers, grave diggers and drivers of taxicabs and flour trucks, among others, have benefited from recent arbitrations in New York City in employer-employee disputes submitted to arbitration.

More than 15,000 laundry workers were granted a 10 per cent. wage increase, a reduction in hours, one week's vacation with pay and other advantages under an award rendered by Dr. George W. Taylor, of the University of Pennsylvania, who served as the arbitrator in a proceeding between the United Laundry Workers Local 300 of the Amalgamated Clothing Workers of America and six associations of laundry concerns in Greater New York. More recently a state-wide board composed of representatives of the public, the workers and the employers has been established by Elmer F. Andrews, State Industrial Commissioner, to make a survey of the industry and set minimum wage standards for women and children in the laundry industry.

The taxicab drivers recently negotiated a contract with the operators of taxicab fleets under which 15,000 drivers are given an opportunity to earn increases in pay, averaging from 10 per cent. to 25 per cent. Certain features of old agreements are to be revised and enforced on an industry-wide basis, such as those concerning union control of hiring and dismissing, and the announcements of the new agreement state that it will include an "air-tight" arbitration clause for the adjustment of grievances.

A nine-day strike of 700 drivers of flour trucks, which threatened an acute shortage of flour and attendant increases in bread prices, was terminated through the efforts of the New York State Mediation Board, which was instrumental in bringing the parties into agreement following an all day conference between employers and union representatives.

A strike of grave diggers employed in a Brooklyn cemetery was terminated through the efforts of Mayor LaGuardia, with the strikers agreeing to return to work on a full-time basis for two weeks, allowing time for the Mayor to appoint a fact-finding committee to study conditions at the cemetery, recommend changes and prepare a definite contract between employer and employees.

RCA-Union Agreement. An agreement of especial interest to industry was signed in October between the RCA Manufacturing Co. and the United Electrical Radio and Machine Workers of America, soon after Edward F. McGrady, former Asst. Secretary of Labor, joined the Radio Corp. of America as vice president in charge of labor relations. Ending a dispute of a year's standing, the agreement covers union recognition, wages, hours of labor, holidays and vacations, seniority and preference, dismissals, union activity and machinery for the adjustment of grievances and differences between Company and Union and between the Company and members of the Union.

Art. 9 of the agreement outlines a method of settling differences and complaints through a succession of steps, beginning with the efforts by the aggrieved employee and his immediate supervisor through a submission of the complaint to the president or secretary of the Union and the chief executive of the Company, in which event a conference is arranged between the chief executive and a committee representing the Union, within 48 hours. The sixth and final step in the process of settling differences is as follows:

> In the event that any dispute shall not have been satisfactorily settled by the foregoing procedure, the matter shall be referred to a committee of three arbitrators, one to be selected by the Local, one by the Company, and the third to be chosen by the two thus selected, within one (1) week. In the event of failure to agree upon a third disinterested arbitrator within the time specified, Dean Joseph S. Willits shall be requested to name the individual to act as such third disinterested arbitrator. The decision of this Committee shall be rendered within two (2) weeks and shall be final and binding upon all parties. The expense of the Committee and any compensation paid to the third arbitrator shall be paid jointly by the Company and the Local.
>
> Neither party shall press any proposal to change, modify or add to the provisions of this agreement except in accordance with the procedure set forth in Article 10 hereof.

The agreement remains in force for one year and thereafter, unless terminated by either party or modified by 60 days' notice to either side prior to the end of the current contract term. During the life of the agreement it is provided that the Union shall not request a closed shop and that there shall be no strikes, sit-downs, picketing, boycotting or other interference except in case of the Company's failure to comply with the arbitration procedure or with any arbitration award.

Arbitration Under the General Motors-Union Agreement. The first grievance to be submitted to arbitration under the terms of the agreement between the United Automobile Workers of America and General Motors Corporation was referred, early in December, to Willard E. Hotchkiss, labor relations expert, as impartial arbitrator. The controversy concerned the discharge of six members of the Union who were alleged to have dipped the feet of a non-union worker in a barrel of rubber dough for having spoken disrespectfully of the Union and its officials. The questions submitted to the arbitrator for determination were whether the accused men are innocent of the charge and should be reinstated and reimbursed for lost wages, or, if they are guilty, whether their act was a violation of the agreement between the two organizations.

Employer Sues Union for Refusal to Arbitrate. Both employers and employee groups are watching with particular interest the outcome of a $100,000 damage suit recently filed in the New York Supreme Court by an employer who claimed that the refusal of the union to arbitrate an industrial dispute, in accordance with the contract between the firm and the union, damaged him to that extent.

The plaintiff was D. L. Sutherland, President of Sutherland Shipping Inc., and the suit has been filed against Local 807 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers. The grounds for damages specified by Mr. Sutherland are that since September 10, when members of the labor organization walked out of his establishment after a difference of opinion on payment for extra help, the firm has been unable to do business.

In his complaint, Mr. Sutherland contends that the strike was unauthorized and illegal since it was called without an attempt

to arbitrate differences. Besides keeping 500,000 pounds of goods tied up on freight docks here and the loss of work to men in other cities where terminals are maintained by the employer, the interruption in business also has made the company liable for losses on perishable products it has not been able to move from loading platforms.

Breach of Arbitration Agreement. In a finding announced on October 30, 1937, the New York State Board of Mediation held that mediation pacts between employers and employees must be upheld and that strikes staged in disregard of such agreements are violations of the contract.

On June 10 a strike of Ludwig Baumann & Co. employees was called and on June 12 was settled when an agreement was reached through the efforts of the then City Industrial Relations Board which provided that all questions relating to wages, hours and conditions of employment would be submitted to arbitration. Max Meyer was appointed arbitrator and subsequently on July 22 made an award disposing of the differences between the Company and the various unions involved. Subsequently, a number of workers became members of the Furniture Woodworking Division, Local 76B of the Upholsterers and Furniture Workers International Union of North America and claimed that its members were not properly represented at the time of the arbitration hearings and that the arbitration agreements arrived at were illegal and not binding upon them. The Mediation Board was asked on October 15 to decide the question of whether the arbitration agreement of June 12 was valid and binding upon these employees. A board of three arbitrators held that the arbitration agreements in this case are binding and legal agreements and should be upheld and maintained, even though it might seem, in retrospect, to be unfair or inadequate in certain respects. The arbitrators' opinion further states:

> The right of collective bargaining given to Employees by our Statutes places a duty upon them to keep and perform agreements made with the employer. If either the employer or the employees were arbitrarily to refuse to keep an agreement made with one another during the course of such bargaining, the advantages gained by both Capital and Labor from collective bargaining would be irretrievably lost. Just as Ludwig Baumann and Company is bound by the agreements in this case, so are these Warehouse Employees.
>
> If employees could, after an agreement was made by their authorized representative, come forward and attack the effectiveness of the agree-

> ment because they claim their representative did not follow private instruction or did not do a good job, the dangers attendant upon such a procedure are obvious.
>
> . . . . We believe that in the award itself will be found the machinery that could well be used to adjust this grievance with little inconvenience and discomfort to all parties concerned.

Arbitration in the Shipping Industry. Joseph P. Kennedy, Chairman of the Maritime Commission, asked a Senate Committee on December 8 to create a labor mediation service for the shipping industry, patterned after the method of handling disputes under the Railway Labor Act. Mr. Kennedy said that eight months of operation under the Merchant Marine Act had revealed two serious ailments—replacement problem and the situation with regard to labor. "The Commission believes" he said, "it would be desirable to have the maritime industry included with railroads under the National Mediation Board. If the American Merchant Marine is to continue and the American people are to continue to support it, tie-ups must cease and the regularity of service must prevail."

Maritime union leaders at the same time are opposing the creation of a mediation board for labor troubles in the merchant marine until contracts with shipowners have been negotiated.

One such contract was announced on November 8, between the Black Diamond Steamship Co. and the National Maritime Union, calling for wage increases averaging 10 per cent. and establishing machinery for the arbitration of disputes. Under the contract, disputes resulting from disagreement over the interpretation of the contract, which runs until September 30, 1938, will be arbitrated by a committee composed of three representatives from each side, the seventh to be selected by the six committee men. In the event of failure to agree on the seventh member, the American Arbitration Association will appoint the impartial arbitrator.

This agreement is in line with the policy announced earlier in the year by Joseph Curran, general organizer for the National Maritime Union, under which American shipowners were asked to aid in setting up "port committees", presided over by an impartial chairman for the adjudication of labor disputes arising out of collective bargaining agreements.

On December 1 a threatened strike of union watchmen employed on the Hudson River piers of the International Mercantile

Marine Co. was averted when Joseph P. Ryan, President of the International Longshoremen's Association, met with executives of the IMM and agreed to arbitrate disputes involving watchmen. Under the agreement reached, two arbitrators are to be named by the company and two by the union with a fifth to serve as impartial chairman, selected by both groups.

Railway Transportation. President Roosevelt's action in creating on November 1 an emergency board to mediate a labor dispute between the Pacific Electric Railway and 2,000 of its employees, represented by the Brotherhood of Railway Trainmen, focuses attention on the accomplishments of the National Mediation Board, operating under the Railway Labor Act, which previously in one single case prevented a strike of 250,000 American railroad workers. The mediation of the Board resulted in the offer and acceptance of wage increases averaging 44¢ a day to railway operating employees, including engineers, firemen, engine-men, conductors, trainmen and switchmen, approximately one-third of the 20 per cent. increase they asked. A strike vote had already been taken authorizing a walk-out if demands were not met, but after two months of negotiations, an agreement was reached.

In the Pacific Railway case the employees were scheduled to go on strike when news of the President's proclamation arrived and the walkout was automatically delayed sixty days. Directly effected by such a strike would have been 200,000 persons who commute daily between Los Angeles and cities in Southern California counties.

16-State Strike Ends. A strike of 1,300 drivers of the Greyhound Bus Lines which had lasted for six days and had affected nine Greyhound Bus companies in sixteen states, with a number of attendant disturbances, was settled on December 1 by John L. Conner, Federal Labor Conciliator.

The striking drivers were awarded an increase in pay of ¼ of a cent a mile but not the closed shop, which was a primary demand of the union. The Lines announced that the contract which the drivers accepted is practically a duplicate of the one offered the union in pre-strike negotiations and again in the first days of the strike.

Labor Covenant Protects Golden Gate Exposition. The builders and laborers who are creating the Golden Gate International Exposition have entered into a pledge and covenant covering building and operation of the Exposition and their cooperation with the Exposition Company.

The pledge was made by the San Francisco Building Trades Council and the San Francisco Labor Council and sets forth conditions of work, cooperation with foreign workers and exhibitors, hours of work, overtime pay, etc. Concerning disputes, the covenant provides that a committee of three shall be selected by the Building Trades Council to meet with representatives of the Exposition Company, to adjust any disputes that may arise in which members of the Building Trades Council are involved. Likewise a committee of three shall be selected by the Labor Council, to meet with representatives of the Exposition Company for the same purpose connected with matters pertaining to the Labor Council.

Builders and Owners Adopt Mediation Plan. A method for settling jurisdictional disputes and to aid in solving some of the problems of builders and union workers in the New York district has been established through an informal agreement between the Building Trades Employers Association and the Building Trades Council, under which two mediators have been chosen to effect a settlement of local jurisdictional controversies whenever possible. They are: Christian G. Norman, Chairman of the Board of Governors of the Employers Association, and Thomas A. Murray, head of the Building Trades Council, who will seek to arrive at an amicable solution of each controversy before it is taken to arbitration under the plan which has been in adoption for some time.

In several instances in the past there has been a stoppage of work, which was welcomed by neither the workers nor the owners, due to disputes between different trades as to which was the proper one to handle work on a construction job, and it is hoped that the mediation plan will put an end to these stoppages. One case involving elevator constructors and electricians has already been disposed of by an agreement.

Where the mediation plan fails, the question goes to the Executive Committee of the Building Trades Employers Association, which holds an arbitration hearing, with decisions accepted by the unions.

Gillmore in New Post. Frank Gillmore, President of Actors' Equity Association and under whose direction was established the arbitration plan which has been so successfully serving the theatre for twenty years, has resigned the presidency of Equity to assume the duties of Executive Director of the Associated Actors and Artists of America. The latter is an A. F. of L. affiliate, exercising jurisdiction over all performers in the various entertainment fields and Mr. Gillmore's leadership of the group is assured for a period of five years. Mr. Gillmore is contributing to this issue of THE JOURNAL an article on arbitration in the amusement industry.[1]

Los Angeles Arbitration Committee. The American Arbitration Association recently announced the appointment of an Arbitration Committee for Los Angeles, of which George L. Eastman, president of Security Materials Company, is chairman and Martin Gang, member of the Los Angeles Bar, is secretary. The other members of the Committee are: Reynold E. Blight, C.P.A.; Guy R. Crump, former judge of the Superior Court, and Gordon R. Watkins, Dean of the University of California at Los Angeles.

The Committee will represent the Association generally in Southern California and will have charge of all matters referred to the Association in connection with the agreement recently signed by the Screen Actors' Guild and the motion picture producers (announced in the July issue of the JOURNAL), under which the Association will appoint the impartial member of boards of arbitrators when the parties to the agreement request this service.

INDUSTRIAL ARBITRATION AWARDS

When may an employer, during an alleged slack season, discharge employees under an agreement which provides for the equal distribution of work, and what principle shall govern such lay-offs, if justifiable?

This question arose under an agreement between a knitting mill company and the union, which agreement provided: 1) for the equal distribution of work amongst all employees in each department; 2) that the union had the right to object to any plan

[1] See p. 24.

of re-distribution, adopted by the employer, and to discuss the matter with the company; 3) that failing agreement by conference, the matter was to be referred to one or more impartial arbitrators to be appointed by mutual agreement of the parties. Conferences having failed, the parties agreed to submit the issue to one arbitrator to be appointed by the American Arbitration Association under the Rules of the Voluntary Industrial Arbitration Tribunal, and he was so appointed.

The facts were that eight employees were dismissed. The company alleged lack of work; while the union claimed that the lay-off was arbitrary; that if there was lack of work it was due to the company's action in farming out orders to another mill and that if there was an actual shortage of work it should be met by distribution among the employees, and in the event of a justified lay-off, the rule of seniority should be followed.

Two hearings were held, each party submitting its evidence personally and through counsel and on the basis of that evidence, and following a joint examination by the parties of the employment records of the mill, the arbitrator made the following award which was accepted by both parties:

> 1. That there was a shortage of work in the mills which did not permit of the employment of the entire crew, and that the evidence did not support the contention that orders were being farmed out.
> 2. Where the work, when spread among the entire crew, did not give each man at least two days' work a week, the employer was free to lay off knitters so as to permit those remaining to work two days a week.
> 3. When the time arrived for a lay-off the employees should have been laid off in accordance with the seniority of employment.

In this case, the arbitrator filed an opinion with the Voluntary Industrial Arbitration Tribunal reviewing the facts in detail and fully explaining the conclusions embodied in his award. (Docket 2302.)

Under what conditions is an employer justified in removing his factory to another city contrary to the provisions of his contract with the union establishing the basis upon which such removal may take place?

The question arose under an agreement supplemental to the general agreement recognizing the Union and establishing a union shop, for the reason that the employer contemplated removal to another location when his lease expired.

The supplemental agreement recognized that the present factory of the employer was not suitable nor economical and that at the expiration of his lease he would have to move. It further provided that he would endeavor to secure suitable premises in the same city or the immediate vicinity, but that in the event no suitable premises could be obtained by the employer, notice to that effect should be given to the union sixty days prior to the expiration date of the lease, to afford it an opportunity to "check up on the good faith of the employer's efforts to locate such premises and to cooperate in locating such premises".

The agreement further provided that if any difference arose, the matter should be submitted to three arbitrators, one selected by each party and the third by the American Arbitration Association. The union and the employer each appointed an arbitrator and a third was appointed from the Panels of the American Arbitration Association.

At the one hearing which was held the testimony showed that the employer had written letters to various real estate firms stating his requirements, but that after a moderate effort to locate proper premises there came to his attention a very desirable factory building in another state, and he thereafter ceased his search for premises in the immediate vicinity. It was also shown that the union itself had failed to prosecute its search for proper premises, but it claimed that it was unable to secure the cooperation of various real estate firms for the reason that the employer had shown an apparent lack of interest in locations proposed by such firms.

A majority of the arbitrators found that the employer did not exercise a sincere effort properly to canvass his present locality for suitable premises and the contention of the union that the employer has not acted in good faith in his efforts to find new premises in his present locality was sustained and, under the supplemental agreement, the employer's right to remove his factory to the other state was denied. (Docket 2211.)

When an agreement provides for lay-offs during certain months of the year, may the employer extend such time to other periods of the year when business is slow?

The controversy arose under an agreement which provided that "the employer agrees to divide the time equally among the union workers employed in the same store or shop".

The union contended that in the metropolitan district the custom had been established that lay-offs should take place in established slack periods, namely, the months of January, February, July and August of each year. The employer admitted that the four months named were the slack periods, but further claimed that under the contract he had the right to lay off workers at any time during the year when business was slack. The union claimed that if this contention were upheld, the entire schedule of wages fixed by the contract would be destroyed.

One arbitrator selected from the panels of the American Arbitration Association was agreed upon by the parties and one hearing was held.

The arbitrator decided that the employer may not lay off workers except during the months of January, February, July and August, in accordance with the established custom in the New Yory city area. The arbitrator further recommended that when the contract comes up for renewal at the end of six months, a definite provision should be adopted permitting lay-offs during any slack period of the year, but with the further provision that the total of such lay-offs shall not exceed the four months established by custom as the period of lay-offs in that particular industry. (Docket 2042.)

May an employer, a restaurant owner, discharge an employee, a waiter, because of an altercation with a customer?

This question arose under an agreement between a restaurant company and a union, which specifically provided that in the event any one of several waiters who had been on strike should be discharged by the employer, a hearing should be had on the reason for the discharge " before a disinterested Board of Arbitration ".

The union and the employer each appointed an arbitrator and then agreed that the third arbitrator should be selected from the Panels of the Voluntary Industrial Arbitration Tribunal and the arbitration conducted under its rules.

The facts were that a customer seated himself at a table arranged for four, and the waiter requested the customer to change to a smaller table, which the latter resented and an exchange of angry remarks took place. The employer claimed that the customer had been directed to that table by the restaurant

manager and that the employee was, first, guilty of insubordination and, second, of using improper language to a customer and, therefore, his discharge was justified. The union alleged that the waiter's request that the customer move to a smaller table was reasonable, and that the employer was using this slight incident to discriminate against the waiter on account of union activity.

One hearing was held, each party submitting evidence personally, on the basis of which the following majority award was made:

That the discharge of the waiter was not justified, since the waiter did not know that the customer had been assigned to the larger table by the manager and was therefore not guilty of insubordination; and, further, that the waiter's request to the customer to change tables was not an unusual or unreasonable one and that the waiter should not be penalized because the customer became angry and demanded the discharge of the waiter. The award required the waiter to be reinstated with one week's pay, one-half of the time he had lost, the other half being disallowed for the reason that the union delayed in bringing the matter to arbitration. (Docket 2306.)

SOME OBSERVATIONS ON THE COURTS AND ARBITRATION IN 1731

As there is no Man who has not more or less made Observations on the Proceedings of the Courts of Law and Equity, and who has not likewise, in some Measure, made Complaints of the Expensiveness and Dilatoriness of the Proceedings and Determinations in those Courts; and who does not wish (if he has any Good Will to Mankind at all) that all Men should have Justice done them with more Expedition and less Expence, than attends the Prosecution of a Cause at Law; it will not be improper, nor I hope an unacceptable Undertaking, to endeavour, by laying down the whole Learning of *Awards* and *Arbitraments*, which hitherto has lain dark and obscure, and as intricate and perplexed as any General Head of our Law, to assist Mankind in making them better Friends and and Neighbours, and in securing to them their Fortunes and Possessions, and to prevent that even this Method of determining Controversies may not be (as it often happens) the Foundation of new Broils and Contentions.—*The Compleat Arbitrator* (1731).

INTERNATIONAL AND FOREIGN ARBITRATION

PEACEFUL CHANGE—A REVIEW OF CONTEMPORARY THOUGHT

EIGHTEEN years have passed since the League of Nations was set up as a bulwark against war. Within that period it has been generously buttressed with conventions, treaties and pacts and a new Court has been created to strengthen its facilities.

Notwithstanding these vast undertakings, there is no security against war. On the contrary, it appears in ever-changing forms: invasions without declarations of war; evasions of international and neutrality laws; fomenting of revolutions that enmesh other states. On the horizon, not too far distant, appears the specter of a gigantic war between different political ideologies.

With these facts before them, men are asking whether there is any new orientation of thought or any realignment of peace activities or any proposals with which to challenge these new aspects of war. Some of these men have attempted to answer this question under a new formula called Peaceful Change.[1] It is our purpose

[1] *Peaceful Change: An International Problem.* A Symposium by C. K. Webster, Arnold J. Toynbee, L. C. Robbins, T. E. Gregory, Lucy P. Mair, Karl Mannheim, H. Lauterpacht, C. A. W. Manning (editor), being lectures delivered at the London School of Economics early in 1937. Macmillan Co. (N. Y.).

Legal Machinery for Peaceful Change, by Prof. Karl Strupp, Member, Inst. of Internatl. Law. Published for the New Commonwealth Inst. by Constable & Co. (London).

A History of Peaceful Change in the Modern World, by C. R. M. F. Cruttwell. Oxford University Press (N. Y.).

Peaceful Change: A Study of International Procedures, by Frederick Sherwood Dunn, of the Yale Institute of International Studies. Published by the Council on Foreign Relations (N. Y.).

to present a brief composite picture of the approach to this subject in six leading publications which deal with it.

We observe, first, the things in which they are alike. Each is convinced that Peaceful Change is an alternative to war; that all settlements and agreements need constant change in the light of rapidly changing conditions and, at the time of their making, they must contain within themselves the means for such change; that the economic foundations of peace are increasingly important; that Peaceful Change and collective security appear to be inseparable; and that, finally, some form of international planning, if not international government, must emerge.

The things upon which these writers differ are equally significant. Whether Peaceful Change is intended only to affect the *status quo* or whether it shall not be identified with a particular dispute and descend to the level of transient disputes is an open question. Whether Peaceful Change is something new and capable of definition or whether the line between war and Peaceful Change is indistinct or invisible is the problem presented by Mr. Cruttwell. Whether Peaceful Change is a philosophy, a method, a formula, a convention for a world state, an institution of international law or a way of international planning, depends upon which book is read.[2]

Taken together, these publications present a most interesting picture of the trend of modern thought in the academic world, for these discussions, with rare exceptions, emanate from teachers rather than actors in the great world drama of peace *versus* war.

* * * *

Peaceful Change: The Alternative to War. A survey prepared for the National Peace Conference Campaign for World Economic Cooperation, by Wm. T. Stone and Clark L. Eichelberger; issued by the Foreign Policy Assn. of N. Y.

The Problem of Peaceful Change in the Pacific Area, by Henry F. Angus, Professor of Economics, University of British Columbia. Published by the Oxford University Press (N. Y.).

[2] Some clarification of these differences may result from the International Studies Conference which has for its present study: "The Peaceful Solution of Certain International Problems; Peaceful Change." Part I is being devoted to *Difficulties of the Problem and Solutions Suggested:* (1) Demographic Questions; (2) Raw Materials; (3) Markets; (4) Colonial Questions; (5) National and Ethnical Questions; (6) Questions relating to the Danubian Region; (7) Miscellaneous subjects. Part II relates to the procedures applicable to the peaceful settlement of these difficulties.

The Symposium on Peaceful Change[3] is perhaps the most stimulating, for it poses the problem so forcefully that no one may take the subject lightly, as easy of achievement. In Chapter I, Professor Webster defines Peaceful Change as a means to avoid war; to produce or remedy justice; and to produce a world order better adapted to changing material and mental processes. He also postulates the method: Shall Peaceful Change tackle each problem separately and by discussion and compromise produce an imperfect result; or shall it consider related problems; or shall it reëstablish the League of Nations? At any rate, he thinks the time is opportune for nations to define their attitude toward Peaceful Change, even though they believe its modern achievement to be impossible.

In Chapter II, Professor Toynbee, in the Lessons of History, enlarges the definition by calling it peaceful and *voluntary* change and points out that there are peaceful changes without visible war which are not in reality such and he gives illustrations in the field of territorial changes and in transfers of sovereignty. He urges the spiritual and mental leisure and perspective for the task of Peaceful Change.

In Chapter III, Professor Robbins indicates some of the economic consequences of territorial inequalities; while in Chapter IV, Professor Gregory is primarily concerned with the economic changes which may result from the administration of present territories. In Chapter V, Miss Mair deals with the specific subject of colonial policy. In Chapter VI, Professor Mannheim presents the psychological aspect which may lead practically-minded readers into unfamiliar by-paths from which they may emerge either inspired or as lost souls. It is a point of view in advance of its time for integration in a program.

In Chapter VII, on The Legal Aspect, Professor Lauterpacht raises some very important questions, in which he cautions against identifying Peaceful Change as a subject with any particular claims for revision and points out that law has to recognize war as an agency of change, for no institution for peacefully adapting the law to changed conditions has been found. His concept of Peaceful Change is as an effective institution of international law in which there is an over-riding legislation which can impose its will on dissenting states. In other words, it is the implementation of Peaceful Change in a world state. Outside of

[3] See footnote p. 47.

this chapter little consideration is given to the procedural side of Peaceful Change.

Mr. Cruttwell's contribution [4] is a steadying influence and is, as its title indicates, A History of Peaceful Change in the Modern World. It not only supplies a past for Peaceful Change, but his brilliant analysis of what is Peaceful Change and what is war will set advocates of Peaceful Change thinking hard on its ultimate achievement. Where, he asks, is the line of demarcation between Peaceful Change and bloodless war, and threats of war and beneficiaries of war, wholesale transfers of populations and other embarrassing situations. And by voluminous illustrations of historical instances he shows how thin is the line between war and Peaceful Change. By these questions and by these illustrations Peaceful Change is lifted from the plane of theory and faces the problems its antecedents faced so many years ago. He does not mean to be discouraging, but when he points out, as one illustration, that it took the United States 120 years to fix its own boundaries finally, from the Treaty of Paris in 1783 to the Cession of Alaska in 1903, it is not possible to envisage the progress of Peaceful Change as a rapid process.

Legal Machinery for Peaceful Change.[5] In this book Professor Strupp sets forth an idealistic plan for making the Kellogg Pact legally enforceable. He would bring this about by having the nations call the Third International Peace Conference (scheduled for 1914) and adopt a convention establishing an International Tribunal of Equity, governed by regulations which he sets forth in an Annex called an International Peace Charter. His plan calls for coordinating existing peace machinery; for its subordination to a Court of Equity and, in some instances, for elimination of existing agencies.

Professor Strupp starts with the assumptions that every dispute can be settled juridically, that present machinery is inadequate, that there are situations in which international law is not applicable and where only generally recognized principles of international justice, which ought to be law, shall be applied. On these premises he proceeds to create an agency for revision by imposing upon various instruments for pacific settlement, after having coordinated them, an international tribunal of equity, with

[4] See footnote p. 47.
[5] See footnote p. 47.

power to hear or review any controversy which has not been finally closed by diplomatic or juridical methods, or which has not been settled in a manner which insures peace. In making its final decision, the proposed tribunal would not be bound by any rules except those embodying its own idea of international justice. Just how these decisions would be enforced, when good faith fails, is not explicitly set forth in the draft; nor is it clear what modification would have to be made in the Conventions establishing the League, the Permanent Court of International Justice, the Permanent Court of Arbitration and other agencies now functioning. It must, therefore, be considered as an ideal that is still lacking in practical details for its realization.

An interesting feature of this book is the comment upon each proposal and the bibliographies; but particularly the introduction by Georges Scelle in which he analyzes the plan. While in sympathy with its objectives, he reveals it as still another pact not more workable than the many now in existence. He points out that it would have no more authority or force behind it than have present institutions and that the prestige of the proposed court would have to depend upon its membership rather than upon public opinion and the social institutions which now support existing agencies. On the whole, he regards the plan as both illogical and impractical.[6]

Professor Dunn, in an American book on Peaceful Change,[7] brings the imaginary bird to earth, so to speak, by defining what nations profess to fight for and by placing emphasis upon the economic elements of war: raw materials (covering fiscal measures and trade barriers, production control schemes and purchasing power and foreign exchange) and population pressure (covering over and under population, industrialized countries and agricultural countries). Considerable attention is given to the Procedures of Peaceful Change, including diplomatic negotiation, conciliation, international conferences, international legislation, inquiry and adjudication, but not in a manner to make them intriguing to the mind or attractive for use. It seems to be Professor Dunn's central theme to turn away from empires and colonial exploitation and toward a freer international trade: by

[6] Further notice of this book will be taken in a review in the April issue of the new series of books on International Equity.

[7] See footnote p. 47.

devising fair practice codes for international trade; [8] by inducing nations to accept some degree of supervision by an international agency in matters of economic interest; by giving access to raw materials, and by freeing the currency. A very real contribution to thought on the subject is his emphasis on the idea that none of the existing procedures is designed to deal with questions of change, but primarily to adjudicate disputes and that, in using this machinery, the tendency is to look upon proposals for Peaceful Change as disputes in which an attitude of defense is aroused. He suggests that a special procedure be adopted for the consideration of proposals in *status quo* and that small, unofficial standing committees be set up in each country for the preliminary consideration of proposals for such changes—these committees having the right to communicate with each other, seeking possible agreement on some common recommendation. He is of the opinion that to use any of the existing machinery at The Hague is inadvisable, as Peaceful Change requires a different approach—a position that may be questioned by those interested in avoiding the multiplication of peace organizations.

Peaceful Change—The Alternative to War—issued by the Foreign Policy Association, is a campaign document, being a handbook for use in the International Peace Campaign. As such it lacks the analytical and dispassionate approach and the broad scientific organization of data which some of the other books attempt. Like Professor Dunn's book it emphasizes the economic aspects, stating the problems of Peaceful Change to be the removal of economic inequalities, the achievement of conditions of justice, and of finding a legal way to bring about Peaceful Change. This survey contains an excellent analysis of the chief grievances of nations—as to more land, access to more raw materials, markets and foodstuffs, as to over-population and as to inequalities in national wealth. As to program: it advocates the open-door principle to all colonial areas, unless some reallocations take place; that all goods of all countries be admitted on a footing of equality through trade and commercial or other treaties or conventions; that trade barriers be removed and a new start made on the basis of international planning for the exchange of goods; that the free flow of currency between nations be accelerated as a means of stabilization; and, finally, that the consideration of labor and living standards must accompany

[8] See Advertising Code, p. 61.

international agreements on tariffs and raw materials. To achieve these ends, it is recommended that some supervisory agency be established along the lines of the International Labor Office to perform a similar service for economic organization and discussion.

It is to be regretted that the authors do not give a clearer picture of the nature of the International Peace Campaign now in progress, so the layman could more intelligently and accurately relate the survey to that program.

In *The Problem of Peaceful Change in the Pacific Area*,[9] Professor Angus thinks of Peaceful Change as a form of international planning and raises some of the questions concerning the dividing line between war and Peaceful Change that have bothered Professor Cruttwell. The chief contribution of this book is its description of the research work of the Institute of Pacific Relations and its relation to Peaceful Change. It contains interesting chapters on the demands of China and Japan, which have been discussed at round-table gatherings, and which have been presented through its various studies.

From the viewpoint of THE JOURNAL, the study and discussion of peace machinery in the Pacific area is of the most pertinent interest, for it is explained that there is no peace machinery devoted to this area, primarily because of opposition to any regional machinery which might tend to weaken the authority of the League of Nations. Professor Angus points out that what is needed is some sort of loose conference machinery which will bring the governments together at regular intervals to promote international cooperation—an objective which the Sino-Japanese war seems to remove still further from realization. In addition to the discussion of peace machinery, readers will find an interesting chapter on the rôle of education in Peaceful Change and the difficulty of enunciating an educational program which will command universal support.

These six publications offer a cross section of Anglo-American thought, with a dash of German idealism and a bit of French philosophy. Taken together, they may well constitute the basis for instruction and discussion on a subject where instruction is but little organized and coordinated, at least in American institutions of learning.[10]

[9] See footnote p. 48.

[10] See p. 76 on Peaceful Orientation of Public Instruction.

If the somewhat simultaneous appearance of these six publications indicates that we may soon see the end of a period in which we have relapsed into weary resignation concerning peace projects; if it means that at last we may obtain some unity between continual discussion and the indifference of statesmen; if it means that it may be possible to coordinate peace efforts under one umbrella large enough to shelter them all in the face of the coming storm—then these publications have a profound significance in the peace literature of today.

CAN INTERNATIONAL ARBITRATION WORK? [1]

BY

JAMES S. CARSON

To attempt to answer the question "Can International Arbitration Work?" it seems to me that it is essential, at the very outset, to dispel a prevalent misapprehension regarding the connotation of the phrase "international arbitration". The average reader or listener almost invariably thinks of arbitration as a proceeding between governments, the purpose of which is to prevent a more forceful method of settling a dispute. This is only one of three types of international arbitration, the other two being the arbitration of controversies between a government of one country and a private individual, citizen of another country, and the arbitration of controversies between two private individuals, citizens of two different countries. In my opinion the latter field holds out some of the most hopeful promises for the future.

Arbitration between governments is generally provided for in treaties or conventions and it may be resorted to before official bodies, like the Permanent Court of Arbitration at The Hague, or between one or more outstanding personalities, like the President of the United States or the Secretary of State of the United States. Such an arbitration cannot work unless it is permeated with good faith. Good faith is necessary from the moment the agreement to arbitrate is entered into until the moment the award has finally been complied with. There is no other method of enforcement, and no legal penalty attaches to a refusal to proceed with an arbitration or non-compliance with an award rendered. Recent

[1] An address delivered by James S. Carson, Vice President, American and Foreign Power Co., over Station WQXR, Monday, December 6, 1937.

international happenings do not indicate that there is a superabundance of good faith in the world at the present time. Therefore, to the question whether international arbitration will work in the matter of disputes between governments, my reply is that it will, and it does, between governments whose ethical standards and ideals are a guarantee of good faith.

We need look no further for examples than our own continent, where, during the past century, boundary disputes and other controversies that would, in other parts of the world, inevitably have led to war, have been settled by arbitration. The first general arbitration treaty in the Western Hemisphere was entered into in 1822 by Colombia and Peru, and has been followed by a series of bilateral and multilateral treaties and agreements which culminated in the Buenos Aires Conference for the Maintenance of Peace in December, 1936. How intelligently the subject of international arbitration was approached in the conventions and resolutions of that Conference is indicated by the number of subjects covered, which include all possible aspects of the promotion of peace and goodwill, through radio, press, education and the development of cultural relations, as well as through the more obvious channels of trade and finance. International arbitration finds its firmest support in such a broad basis of goodwill in international relationship.

The second type of international arbitration is of an entirely different nature. It is used in controversies between an individual citizen of one state on the one hand, and the government of another state, on the other hand. This type of arbitration is comparatively new and has come into prominence during the past decade, with the increasing powers of certain governments. The nature of such controversies is usually commercial and, involving, as they may, important concessions, they carry the seed of ill-will which may eventually affect relations between governments. Arbitration is, therefore, particularly desirable in such controversies. Whether it will work or not is difficult to foretell, but two recent cases between the Radio Corporation of America on the one hand and the Czechoslovakian and Chinese governments on the other,[2] would indicate that it will. Although the awards in the two cases cited were diametrically opposed, the company winning in Czechoslovakia and losing in China, the reasoning attendant on the special circumstances was acceptable to the disputants.

[2] See Vol. 1, No. 4, p. 372, for a discussion of these cases.

In discussing this type of arbitration, reference may also be made to several arbitral tribunals established by governments or under government supervision, for the arbitration of foreign trade disputes between government-controlled organizations in one country and a merchant of another country. While this type of arbitration is governed by rules, usually supported by legislation and strengthened by legal machinery for enforcement, it seems to lack one of the essentials of arbitration, namely its voluntary nature. A foreign merchant seeking business in countries having such tribunals must either accept the arbitration provision or lose the business.

The third type of international arbitration is the settlement of controversies between two individuals, citizens of different states. This type of arbitration is almost invariably commercial and may grade from the smallest of claims to extremely important contracts. Its peculiar importance lies in the maintenance of goodwill and friendly commercial relations between individuals; since this feeling logically communicates itself to governments and thus strengthens the wider field of friendly relationship between nations. In this commercial field we may positively say that arbitration works. Excellent machinery is available through the International Chamber of Commerce, the American Arbitration Association, the Inter-American Commercial Arbitration Commission and various specialized tribunals which provide for arbitrations in disputes involving certain types of merchandise. It is impossible to tell the number of international trade contracts which provide for arbitration, but when cases arise, we know that in the majority of countries agreements to arbitrate are honored and awards complied with, without resort to legal machinery. On the other hand, since such arbitrations are in the domain of international private law, laws governing their procedure are receiving constant attention and everything is being done to facilitate the settlement of international commercial controversies by this means.

The maintenance of peace between governments is the highest achievement that may be expected from arbitration. In order to attain it, we should recognize that one cannot begin to build at the top. A wide, sound basis of national knowledge of arbitration is necessary before the international field can be developed to its fullest capacity. A man who will not arbitrate small questions, will not arbitrate big ones. The man who does not arbitrate at

home, will not arbitrate abroad. An aggregation of men who will not arbitrate, make for a government that will refuse arbitration. Two such governments in conflict lead to war.

All this indicates that we have to begin with education. National education in the use of arbitration, education through the various international bodies that reach private citizens, expansion of arbitration between individuals of different countries in the course of international trade, a general raising of the level of good faith and confidence, public opinion guided towards peaceful settlement of international controversies—these are the steps that lead to the general acceptance of international arbitration, and where these steps are logically taken, we may safely say that international arbitration can and does work.

ARBITRATION IN UNITED STATES FOREIGN TRADE ZONES

BY

WALTER E. PERKINS *

THE establishment of Foreign Trade Zones at ports of entry in the United States centralizes many foreign trade operations hitherto subject to diversified handling, which fact will give rise to many situations emerging in the course of foreign trade. The interests of the public, the government and local authorities, public and private corporate operators, as well as foreign traders, converge under the new arrangement. Disposition of differences arising in the course of foreign trade, as carried on through the recognized channels, has been covered extensively by many authorities. Trade pacts between the United States and various nations are contemplated to increase foreign trade, in which the zones will largely share.

Following years of effort to achieve legislation, Foreign Trade Zones were authorized by the 73rd Congress and the President, on June 18, 1934, signed the Celler Bill, Public No. 397, defining such zones.

A Foreign Trade Zone is defined as an isolated, enclosed and policed area, under the supervision of a designated board of Federal officials and operated as a public utility by a corporation, in or adjacent to a port of entry, without resident population,

* Secretary, Foreign Trade Zones Committee, Port of San Diego, California.

furnished with the necessary facilities for lading and unlading, for the sorting of goods and for reshipping them by land or water; and an area into which goods may be brought, stored and subjected to certain specified manipulative operations. If reshipped to foreign ports, the goods may leave the zone without the payment of duties and without the intervention of customs officials, except under certain conditions.

Since Foreign Trade Zones were permitted under the Act, they have been widely discussed by port authorities, chambers of commerce and other bodies throughout the nation, the consensus of opinion being that perhaps three essential factors would outline their utility: (1) development of the merchant marine; (2) establishment of facilities for increased trans-shipment and consignment trade, and (3) increase in employment, through manipulative processes permitted in such zones and consequent increased port facilities.

Following surveys by various American ports covering the possible advantages of such zones, applications to the Department of Commerce for permission to establish zones have been made at Atlantic, Pacific and Gulf water gateways. In this connection, it is interesting to note that the recently established New York Foreign Trade Zone has, in its early operation, justified the opinion outlined in items one and two above, and it is reported that one shipment of *garbanzos* (foreign chick peas) arriving at that zone last October, exceeded the total imports of the same commodity through the New York customs district in any one year since 1931. In addition to the task of unloading the cargo, which employed 150 longshoremen several days, weeks of additional employment were provided in the manipulative processes such as cleaning, grading, sorting and fumigation.

Here arises a very interesting situation creating an entirely new set of conditions to which foreign merchandise is subjected, somewhat analogous but by no means parallel to those permitted under the Tariff Act of 1930 in various classes of bonded warehouses. It would seem desirable to go further than the recommendation to insert arbitration clauses in documents pertaining to the movement of merchandise through the zones, namely "the provision for creation of a permanent Foreign Trade Zone Arbitration Committee", for the reason that tendency toward new circumstances of a controversial nature is enhanced by the fact that the zones are, in this hemisphere, admittedly of an experi-

mental nature. Furthermore some of the European zones in which shipments originate permit manufacturing, which is forbidden in the United States under the Act.

Justification for the application of arbitration to a Foreign Trade Zone, in which operation is closely related to maritime activities, will be found in the element of delay so often encountered in court calendars, to the detriment of litigants in cases involving witnesses who may be on the high seas at the time set for their appearance. The actual conduct of the proceedings, the choice of arbitrators and other conditions, should follow the Standard Rules already established by the Commission; and a panel of arbitrators should be established and announced by public and private corporations seeking operative rights as grantees. This expert arbitration, working as an integral functioning unit of United States Foreign Trade Zones, would, insofar as jurisdiction allowed, promote the harmonious operation of the zones in their critical early stages and minimize the risks of prolonged controversies.

While not attempting a detailed comparison of the permissive operations under the Celler Act to those allowed under the Tariff Act of 1930, it is evident even to a casual perusal of the two that in the manipulative processes, management and the solution of problems envisioned under the new Act, arbitration facilities as a functioning unit of the zones should be one of the first considerations of the applicant for permissive operation.

NOTES AND COMMENT

U. S.-Norway Proposal to Arbitrate Citizens' Claims. The United States Department of State, in view of persistent and recently renewed demands of the Norwegian Government for the settlement or arbitration of the claim of its citizen, Christoffer Hannevig, has proposed to the Government of Norway the exchange of a series of pleadings of fact and law with a view to crystallizing the factual and legal issues of the case, with the further proposal that the matter be referred to the Court of Claims of the United States for adjudication if the two Governments are then unable to dispose of the case and provided the necessary authorization therefor is given by Congress.

The claim of Hannevig goes back to 1917 and arises from the requisitioning of certain shipping construction contracts and certain ship yards in which he held an interest through American corporations. Since complete settlements of all claims on that account were made with the receiver of the corporations in question in 1921, the United States has steadily maintained that the claim was without merit.

In submitting its offer to the Norwegian Government " in the interest of amicable relations between the two Governments and of perfect fairness to both the Norwegian Government and the claimant," the Department of State conditioned its proposal upon the agreement of the Norwegian Government to a similar exchange of pleadings and conditional arbitration (in this case before a sole neutral arbitrator to be agreed upon by the two Governments) of a long pending claim of this Government in behalf of the George R. Jones Company, Inc., which suffered heavy losses in 1920 on account of difficulties in Norway in connection with large shipments of American-made shoes.

The procedure suggested by the United States in the Hannevig claim (to be reversed in the Jones claim), briefly summarized, is as follows:

First: Within six months of acceptance of the proposal by the Government of Norway, it shall present to the Government of the U. S. a statement of the claim, setting forth the precise items of loss or damage and the amount of each separate item; the facts alleged in support of each item, and the principles of international law upon which each item is alleged to rest, accompanied by all evidence. Thereafter no further evidence is to be injected into the case.

Second: Within six months after receipt of the statement, the Department of State will present its answer to the Norwegian Government, setting forth the defenses to each item of the claim and attaching all evidence.

Third: Within four months from delivery of answer, the Norwegian Government shall file with the U. S. Government a written brief.

Fourth: Within four months thereafter the U. S. Government shall file a reply brief.

Fifth: In the event the two governments shall be unable to agree upon a disposition of the case within the six months next succeeding delivery of the reply brief, the pleadings thus exchanged may be referred for adjudication, after the necessary authorization of Congress, to the Court of Claims of the United States, with the understanding that in no event shall the factual or legal issues of the case or the contentions of the parties be changed or the written record above described augmented in any way.

International Council to Deal with Unfair Advertising Practices. An International Council on Standards of Advertising, which will administer an International Code of Standards of Advertising Practice and deal with cases of unfair dealing in advertising as affecting international transactions, has been established by the International Chamber of Commerce by a resolution adopted at the Chamber's recent Berlin Congress.

The creation of the International Council is the result of a resolution adopted by the International Chamber of Commerce at its Congress in Paris in 1935, which established a Committee on Advertising to inquire into the effects of fraudulent or dishonest advertising on the profession itself and on trade and public confidence. Upon completion of its investigation the Committee reached the conclusion that the most effective way of dealing with the matter was to establish an International Code of Standards of Advertising. This proposal was submitted to and adopted by the Berlin Congress, with the recommendation that the Code become applicable in all countries.

The Code of Standards adopted by the Berlin Congress is divided into four parts—Basic Principles; Principles Designed to Secure Public Confidence in Advertising; Principles Designed to Insure Fair Dealing between Advertisers, and Principles Relating to Advertising Agencies and Advertising Media.

The Council consists, in the first instance, of the Chairman and Vice-Chairmen of the Committee on Advertising of the International Chamber of Commerce, with power to add to their numbers and to appoint a permanent board comprising the Vice-Chairman of the Committee on Advertising residing in Paris (as Chairman) and two or three Administrative Commissioners of the International Chamber of Commerce also residing in Paris.

Following is the method of handling complaints of violations of the Code:

> Complaints, substantiated by relevant documents, shall be submitted in writing to the Chamber's National Committee of the party making them.
>
> If appearing *prima facie* to bear upon a *bona fide* case of unfair dealing as defined by the Code, complaints shall be transmitted by the National Committee to Headquarters of the International Chamber of Commerce. In countries where no National Committee exists, complaints may be forwarded direct to Headquarters of the International Chamber of Commerce, in which cases they shall be examined by Headquarters as to their acceptability.

The International Council on Standards of Advertising shall meet at Headquarters of the International Chamber of Commerce at periodic intervals. Cases of an urgent nature shall be dealt with by the permanent board on its behalf; but in such cases the decisions of the board shall be transmitted to the members of the International Council, and no further action shall be taken thereon until four days after the dispatch of such notification.

The International Council and the permanent board shall determine, on the basis of the facts submitted to them, whether or not there is infringement of the Code. Complaints of such a nature as to be susceptible, in the opinion of the International Council or the permanent board, either of formal arbitration or conciliation under the procedure of the Court of Arbitration of the International Chamber of Commerce, shall be referred to the competent department of the Chamber for suitable action.

Recommendations of the International Council or of the permanent board shall be transmitted to the party forming the object of the complaint through the National Committee of his country, who shall use its influence to induce him to carry out these recommendations.

In countries where no National Committee exists, recommendations shall be transmitted to the party complained of either direct or through an organization member of the International Chamber of Commerce, where such an organization member exists. Recommendations shall be restricted to obtaining the discontinuance of the act or practice complained of.

The International Council or the permanent board may invite the party forming the object of a complaint to present his defense. This shall be done in writing, through the National Committee of his country, or where no National Committee exists, either direct to Headquarters of the International Chamber of Commerce or through an organization member.

The International Council or the permanent board may likewise invite the parties either to appear in person or to be represented before them by duly accredited proxy. In this event, the Administrative Commissioners of the respective countries of the two parties shall, as far as possible, sit with the International Council or the permanent board.

The Chamber has announced that it is not its intention to attempt to give the Code a legal character or to carry it into international law. It is merely proposed to combat unfair dealing in international advertising by establishing standards and bringing moral pressure to bear in order to obtain their observance. This effort had the warm approval of the 3rd World Advertising Convention, which met in Paris in July, 1937, shortly after the adoption of the plan by the Berlin Congress. More recently, the code has been adopted by the German *Werberat*, the central national organization for all matters relating to publicity and

advertising, and in the United Kingdom has received the approval of the Council of the Advertising Association. The Code has also received wide publicity in the United States, France, Austria, Belgium, Sweden and other countries, in a number of which it is expected soon to be adopted.

A Unique Research Plan in International Law and Arbitration. The International Committee of Historical Sciences decided in 1932 to establish a Sub-Committee for compiling a bibliography of the peace movement in history. The Sub-Committee thus founded is located at the Library of the Palace of Peace at The Hague, and consists of the following scholars:

Doctor Christian L. Lange (Norway), President; His Excellency Mr. Rafael Altamira (Madrid and The Hague); Professor Merle E. Curti (Northampton, Mass., U.S.A.); Professor Hans Wehberg (Geneva); Doctor Jacob ter Meulen (The Hague), Secretary.

Although the Nobel Institute at Oslo and the Library of the Peace Palace at The Hague both contain very large collections of source-material with regard to the peace movement, it was felt that a rich documentation still lies buried in the great national libraries. After several years of intensive research the Sub-Committee has now printed the first provisonal list of bibliographic material, covering the period 1480 to 1776 and from 1778 to 1803. These lists, a copy of which is available for inspection at the office of the American Arbitration Association, are provisional in character in order to give scientists and others who take an active interest in this research an opportunity to contribute to the list by drawing the attention of the Sub-Committee to books or writings on the subject which may have escaped their knowledge. The bibliography starts out with the various writings of Desiderius Erasmus of Rotterdam.

With special reference to the arbitration movement, it appears that pamphlets and books suggesting arbitration as a means for the pacific settlement of international disputes were written and published as early as 1693, when William Penn suggested "the establishment of an European Dyet, Parliament or Estates." Toward the end of the eighteenth century, and particularly after Kant had published his famous book on "The Problem of International Peace" in 1796, proposals and suggestions for the arbitral settlement of political and other international disputes were made from all parts of the world.

Obligatory Arbitration of Labor Disputes in Denmark. The Danish Law on Arbitration in Labor Disputes is dated October 9, 1919, with several later additions. By this law a permanent Court of Arbitration was founded, composed of 6 judges, 16 deputies, 1 president, 2 or 3 vice-presidents, as the Court of Arbitration find it necessary, and 1 secretary. Of these the Confederation of Employers' Organizations, "*Dansk Arbejdsgiver og Mesterforening*", and the Trade Union Congress, "*De samvirkende Fagforbund i Danmark*", each chooses 3 judges and 8 deputies. The Court itself chooses the president and vice-president, and in case the election has not taken place at a certain time, the president of the Supreme Court and the presidents of "*Landsretten*" and "*Sø-og Handelsretten*" in Copenhagen jointly appoint the judges from the judicial members of these Courts. The law applies to the following cases:

A. Questions involving infringements of the agreement of September 5, 1899, between "*Dansk Arbejdsgiver og Mesterforening*" and "*De samvirkende Fagforbund i Danmark*" shall be brought before the Court of Arbitration.

B. Provided an agreement does not contain any provisions to the contrary, it shall be possible for one party to bring cases of infringements of agreements between trade unions as one party and an employers' organization or a single firm as the other party, before the Court of Arbitration, in accordance with the following provisions and with the later mentioned consequences:

1. If an employers' organization violates an agreement with a trade union.
2. If one or several members of an employers' organization, contrary to an agreement with a trade union, acts in a way which violates an agreement with the trade union or a single member.
3. If a trade union or its members violate the agreement with an employers' organization, the organization whose right has been violated may complain by summoning the other party before the Court of Arbitration.
4. If a single firm has made an agreement with a trade union, the trade union and the firm have the right to summon each other before the Court of Arbitration in similar cases as those mentioned in 1 to 3.
5. If an employers' organization or members thereof, or a single firm, institute a lock-out of a trade union or members of it, and the organization affected claims that the lock-out is not valid under the agreement between the two organizations and in the course of five days files a written protest against the lock-out with the organization or the firm causing the lock-out, either of the parties

may bring the question before the Court of Arbitration. Corresponding rules apply to the opposite case, when a strike is called by a trade union.

6. When an employers' organization or its members, or a single firm, commence or continue a lock-out against a trade union or its members, the latter has a right to summon such organization or firm, before the Court of Arbitration when it is of the opinion that the lock-out itself or the unfulfilled claim out of which it arises is contrary to an existing agreement, or to a legally pronounced award or an award of the herein mentioned Court of Arbitration.
7. The same rights are granted to an employers' organization in case of strike.

C. Other controversies between employers and workers can be brought before the Court, with the approval of a majority of at least five members, when a general or special arrangement to this effect is made by an employers' organization or a single firm and a trade union.

D. If one of the above-mentioned organizations or single firms is a member of a more extensive organization, the action shall be brought in behalf of or against such organization, and the award shall be given against or for the latter on behalf of the plaintiff and the defendant.

The Court of Arbitration decides whether the facts in a given case are contrary to the said agreements and determines the consequences thereof, and may impose a fine on the guilty party, which falls to the other party. Further rules concern the calculation of the fine.

Where right to appear before the Court of Arbitration is given, action to the ordinary courts is precluded; although the single worker is not precluded from bringing an action to the ordinary courts for outstanding wages, unless the trade union, during the proceedings before the Court of Arbitration, has renounced this right on behalf of the workers.

If the case in whole falls under a special (professional) Court of Arbitration, the Court of Arbitration here described may stay the action, but if it involves disproportionate trouble or delay or appears to be impossible to get the award from the special Court of Arbitration, or if both parties wish it, the Court of Arbitration may make the award itself.

It is further stated that when a strike or lock-out is not illegal, the mere public announcement of its proclamation or coming into force is not illegal.

Further rules govern the proceedings and the procedure, which in all essentials correspond to those concerning the ordinary Courts. Parties may be represented by counsel; and both the parties and witnesses are required to appear personally before the Court, in the event the Court wishes to question them.

The awards of the Court of Arbitration are executed as judgments of the ordinary Courts. The costs fall to the Court.—BERNT HJEJLE (Copenhagen).

Manitoba's Efforts to End Strikes and Lock-Outs. The Province of Manitoba, Canada, is carrying on an interesting development of the arbitration principle in industrial disputes under a statute passed at the last session of the Legislature entitled " The Strikes and Lock-Outs Prevention Act " which became effective April 17, 1937, and is designed to prevent strikes and lock-outs until the differences between employers and employees are first reviewed by an official of the Provincial Labor Department or a Board of Conciliation and Investigation.

The Act is administered by the Minister of Labor (or such other Minister as may be designated by the Lieut.-Governor-in-Council) to whom either party may make application for the appointment of a Board of Conciliation and Investigation when disputes exist, and who thereupon appoints the Board or first authorizes a suitable person to attempt to bring about a settlement or to make a report, upon receipt of which the Minister may appoint a Board or refuse, as he sees fit, and his action is final.

Each Board consists of not less than three persons, who must be British subjects and with no pecuniary interest in the dispute, appointed as follows: Each party to the dispute recommends the names of a specified number of persons, ready and willing to act. Upon their appointment by the Minister, they, in turn, recommend one person, who is named Chairman of the Board. Upon failure of either side to recommend, the Minister forthwith appoints the required number of members. The Board holds office from the time of its appointment until a report is signed and transmitted to the Minister. Members of the Board are required to take an oath that they will faithfully and impartially perform the duties of their office and receive remuneration for their services, as fixed by the Lieut.-Governor-in-Counsel. Any member of a Board accepting any perquisite or gratuity beyond that fixed is subject to a penalty of $1,000.

Applications for the appointment of a Board of Conciliation and Investigation must be accompanied by a statement setting forth the names of the parties, the nature and cause of the dispute, including demands or claims by either party to which exception is taken; an estimate of the number of persons affected by the dispute; recital of the parties' efforts to adjust the dispute themselves and a declaration that, failing an adjustment of the dispute or a reference thereof, a strike or lock-out will result.

Upon appointment in a specific dispute, the Board is furnished with the application and accompanying statements and proceeds forthwith to deal with the matters contained therein. The Board has power to summon witnesses and to proceed in the absence of either party who fails to attend after notice has been given.

The Act provides for adjournment in the inquiry and investigation to allow the parties to reach an agreement whenever one appears possible; if no settlement is arrived at during a reference, the Board shall make a full report thereon to the Minister, setting forth all facts and circumstances and its findings thereon and its recommendations for the settlement of the dispute, according to its merits and the substantial justice of the case.

After an application for the appointment of a Board has been made or during the reference of the dispute, no employer may declare or cause a lock-out nor shall any employee go on strike; this provision, however, not to apply in any case where an application is refused or is not granted within seven days.

The Department of Public Works of the Province of Manitoba reports that during the short time the statute has been in effect, excellent results have been obtained and a number of cases have been successfully dealt with.

Compulsory Arbitration in British Columbia. The Legislature of British Columbia has given to all workers the right to bargain collectively with their employers, to organize unions without hindrance and concessions in some cases beyond the demands of the unions, to counterbalance which the Legislature requires that labor accept arbitration of disputes with employers, which is made compulsory under the new act if either side asks for it.

The first step in a program designed to prevent strikes is an effort at conciliation, the government appointing a Conciliation Commissioner upon application of either the employer or the workers. If conciliation fails, arbitration must follow, the Arbi-

tration Board consisting of a representative of the workers, a representative of the employer and a third selected by these two, all of whom must be British subjects. After the Arbitration Board has reported, employers have the right to lock out their workers and workers have the right to strike, but only after eleven days' notice. As the required time for conciliation and arbitration would consume twenty-nine days from the beginning of a dispute, the Legislature counts on this period to bring the full facts to the attention of the public, which is regarded as the final court of appeal in any industrial crisis.

Collective Agreements in Italy. The press in the United States called attention in June, 1937, to the conclusion of collective agreements between employers' and employees' organizations in Italy, which include machinery for the settlement of grievances, first by arbitration and, failing that, by special tribunals established for that purpose. Further information concerning these collective agreements has been supplied to THE JOURNAL by its Italian collaborator, Mr. Roberto Pozzi, of Milan, who writes as follows:

> The agreements referred to do not constitute a new or unusual fact in Italy, but, on the contrary, are a normal and customary application of the principles of public order governing the conditions of labor, which are all brought together by a law constituting the basis of the fascist system, called the Labor Charter.[1] The fundamental principles of the contracts are the following:
>
> 1. All citizens are placed within special organizations of the categories of work. Therefore, there are the syndicates of the employers of labor and those of persons who lend their services, for each branch of industrial activity and for agricultural and commercial activity, with the two syndicates of each branch forming the corporation of that branch. Those persons exercising a free profession are formed into a special corporation.
>
> 2. The fixing of the terms of the collective contracts for labor is entrusted to the corporation which draws them up, at the same time taking into account the points of the two syndicates of the employers and employees at the head of them, and the resulting contracts are obligatory for all members registered in the one or the other syndicate.
>
> 3. Should it not be possible to reach an agreement inside the corporation upon the respective demands of the two syndicates of employers and employees, the settlement is referred to the magistrates

[1] Copy of the Labor Charter obtainable from THE ARBITRATION JOURNAL.

of the labor court, having special jurisdiction and composed of high magistrates delegated by the State, whose decisions are obligatory upon all interested parties. In the same way, the disputes in connection with the renewal or the modification of collective contracts for labor are regulated.

With regard to individual disputes between a single employee and an employer of labor concerning their respective rights and duties in the application of a collective contract, it is obligatory first to attempt a reconciliation before the corporation of the branch involved. Failing to come to an agreement, appeal is open to the magistrates of the labor court.

In any case, both strikes and lock-outs are forbidden in Italy and are repressed as crimes. During 15 years of the fascist régime there has, in fact, been neither a strike nor a lock-out in Italy.

COMMERCIAL ARBITRATION AWARDS

The Austrian Drug Case. An American drug corporation was formed in 1929 to act, under an exclusive sales agency contract, for a manufacturing drug firm in Vienna, which at that time desired to enter the American market with its various preparations, then unknown to this country, and subject to the formidable and uncertain approval and acceptance by the American Medical Association.

Difficult as the situation appeared, the American interests undertook to guarantee the sale of a certain amount of the Austrian products and to exploit and, if possible, capture the domestic market for their sale and use. It appeared in a short time that the American firm had become over-sold on the proposition, with the result that in 1932 the contract was mutually and amicably terminated and a new agreement entered into, with more liberal terms and without any specified guarantee as to the quantities to be moved by the American.

Out of this superseding agreement grew the subsequent dispute submitted to arbitration in 1937 in the American Arbitration Tribunal, having to do with what was meant by the undertaking of the American agent that it would conduct within the United States "a propaganda" to secure the acceptance and promote the sale of the various preparations of the Austrian manufacturer. It is necessary in this connection to understand briefly the position and power of the American Medical Association, which,

by its acceptance or rejection of pharmaceutical preparations, can advance or retard the marketing of such preparations in the United States. Obviously, in consequence of this power, great pressure is brought upon the Association by the parties endeavoring to secure the acceptance of their products. The campaign for this purpose is conducted in discussions in the leading medical and pharmaceutical publications and in the comments and endorsements of leading physicians and other recognized authorities in the most representative universities and hospitals of the United States. Approval of only two of the drugs had been obtained by the American firm during the existence of the first contract, and it was "proper propaganda" to obtain this approval in respect to *all* drugs from the Austrian source that the agent undertook to conduct under the new agreement.

Under a submission agreement the following questions were presented to arbitration:

1. Had the American agent conducted proper and sufficient advertising and propaganda to the medical profession and other potentially interested persons and institutions covering the value and availability of the Austrian products?
2. Was the Austrian manufacturer, by reason of the alleged non-performance of its American agent in this respect, entitled to terminate the contract?

It should be pointed out that by the time the dispute arose *four* of the Austrian products had been approved by the American Medical Association, admittedly through the efforts of the American agent, and had found, at least in principle, an American market, and one of the four preparations had a large and profitable sale in the United States. The remaining four products had not found acceptance, and it was the contention of the Austrian manufacturer that the agent was not using sufficient effort to increase the sale (with the one exception noted) of the approved products. Obviously the agent wished to retain the benefits of its labor as to the saleable items, while the manufacturer desired a new agent.

The hearings developed many varied and interesting points concerning the conduct and ethics of the medical and pharmaceutical professions, as well as a legalistic interpretation of the meaning of "a proper propaganda" under the extraordinary circumstances involved. Eight hearings were conducted by the board of three arbitrators, consisting of two lawyers and a drug

manufacturer, and at the opening hearing the manager of the Austrian firm gave his entire testimony in order to depart for Europe the following day.

The circumstances which apparently determined the interpretation of "a proper propaganda" seemed to lie in the fact that the Austrian firm, with knowledge of the price difficulties and the efforts of its American agent, could not reasonably expect nor call for greater or more effective efforts than the agent was able to establish it had made under the second contract. Accordingly, the award sustained the contract in all respects and directed the principals to continue their relationship until the same shall expire in 1939.

What Constitutes Date of Shipment of Trans-shipped Goods? Trade customs are sometimes at variance with the strictly technical interpretation and application of the rules of law, as is demonstrated by a case recently decided by arbitration in New York by a sole arbitrator who possessed the necessary experience in and knowledge of the trade involved. The case concerned a shipment to New York of a quantity of tapioca flour from the island of Java, Dutch East Indies. The parties entered into a sales contract providing for shipment to be made *during January 1937, from Java.* The particular quality of tapioca flour purchased is produced only in a remote part of Java and is shipped from Tegal, a small port in the northern part of the island. Tegal is not a transoceanic port but a coastwise port of call, whence vessels carrying this flour proceed to Batavia, which is the main commercial port of Java and from which vessels regularly leave for New York and other great ports of the world.

The flour in question was shipped by steamer "Both" leaving Tegal on January 30, 1937, arriving at Batavia February 21, 1937, where the flour was transferred to the steamer "Tabian", which sailed from Batavia on February 22, 1937, and arrived in New York on April 20, 1937. The buyer thereafter refused a tender of the flour on the ground that the shipment had not been made during January 1937 *from Java.*

The question presented, therefore, was whether the shipment on the "Both" on January 30 from Tegal was, under the above circumstances, a compliance with the term of the contract which required January shipment *from Java.* At the hearing the seller submitted testimony as to the district in Java where this quality

of flour is produced, that Tegal is the only port of departure for the same and that goods out of this port, and particularly tapioca flour, are customarily trans-shipped at Batavia for foreign dispatch. It should be added that a single bill of lading was produced evidencing that the steamer "Both" formed a unit with the steamer "Tabian" under a definite working agreement between the owners of the coastwise line and the Java-New York Line.

The buyer's contention was that the placing of the flour upon the "Both" was not a compliance with the requirement that the shipment must be made *from* Java during January, as the goods actually were *in* Java after February 1st and departed *from* Java only after trans-shipment as stated above. In support of this contention the buyer, in a carefully prepared brief, submitted decisions of the Federal Courts, the courts of New York and Massachusetts, as well as other jurisdictions, all of which, considered only on their technical merits, *might* have seemed to determine the issue. All were to the effect that the goods must be put upon a vessel directly bound for the port of destination and that a trans-shipment was a breach of contract on the part of the seller. But none of these cases covered situations of sufficient analogy, in the arbitrator's opinion, to be of necessary weight; one citation concerned sugar from Cuba, another hemp from the Philippine Islands and a third iron ore from the Pacific Coast, and hence were not good in rebuttal of an established trade custom covering the particular trade in question and the circumstances of the exact transaction there under consideration. Accordingly, the arbitrator rendered an award in favor of the seller.

INTER-AMERICAN COMMERCIAL ARBITRATION AND GOOD WILL

COMMERCIAL ARBITRATION AND THE MEXICAN LAW OF CHAMBERS OF COMMERCE OF JUNE 12, 1908

BY

DR. ROBERTO COSSIO, MEXICO CITY

THE Private Law of Mexico is strongly influenced by Roman Law. But the influence we find is not purely Roman; it is interspersed with Barbarian elements, for at the fall of the Roman Empire

it was the Barbarian Rulers who adapted, or attempted to adapt, the law to their own exigencies and customs. This body of law inspired later Spanish jurists who developed a legal system which, prevailing in Spain, very naturally had a decisive influence upon the Spanish colonies, including Mexico.

Unfortunately this juridical tradition, representing the experience of centuries, has deteriorated not only in Spain, but also in Mexico. However, the same tradition was the basis of French Law and, as the dominating factor in the field of law, it reappears in Napoleonic Legislation. The Napoleonic Codes may be considered the hub around which revolve the great majority of the laws dating from the middle of the past century until the early part of the present one. In this manner French Law, through both Spanish and Roman Law, has stamped its influence upon the Mexican system.

All in all, our legislative picture presents a hybrid; for our public law is chiefly influenced by the American legal system while our private law derives mainly from Europe. Inconsistencies in the body of laws cripple the system and harmony and unification could only be brought about through a purely Mexican Institution, which sifts all legislation in Private Law, examining its constitutionality by way of the Federal Tribunals, with final appeal to the highest resort under the Constitution, namely the Supreme Court of Justice.

Such a legislative picture should, logically, be favorable to arbitration, particularly since arbitration need not necessarily be bound by rules of law; nevertheless, we find that arbitration in our system is an exotic plant, nursed in the hot-houses of legislative provisions, but used only at rare intervals.

The tendency toward simplification of procedure has always been one of the signs of a highly cultured social system. For instance, in Roman Law such simplification was undertaken under the reign of the Antonines and of Justinian. Under the former the celebrated *Rescripta* was issued, which authorizes a mortgage creditor to proceed, on his claim, by special agreement, extrajudicially. Justinian promulgated the Constitution of "*Tempor Appellat*" whereunder parties to a lawsuit may waive their right to appeal, reducing the proceeding to one single instance.

We find in the *Novisima Recopilacion*, issued by Courts of Alcala, that parties to a lawsuit may disregard such procedural provisions which are not always essential in juridical procedure;

this tendency has, however, found no echo in existing legislation. While Article 1501 of the Code of Commerce of Mexico establishes that preference shall be given to commercial procedure, parties to lawsuits generally specify no procedure.

Article 55 of the Code of Civil Procedure specifies that the provisions of the Code are binding; the parties may not, by any agreement, waive any rights or change any procedural requirements. These procedural provisions are extremely severe, and the provisions governing submission to arbitration require that such agreement be incorporated in a public document. Thus the first step to arbitration causes expense and difficulty.

It is well known that Commercial Law is subject to evolution, in accordance with the requirements of trade; frequently it may be observed that provisions of the law are not applicable when the law has remained stationary while commercial practice has gone on, breaking into new fields and creating new situations, beyond the scope known to the makers of the law. This is especially true of Mexico, where the Code of Commerce dates from September 15, 1889. Notwithstanding the fact that several laws have been drafted for the purpose of harmonizing the legal system with practical life, such as, for example, the laws on Commercial Organizations, on Communications, on Institutions of Credit, on Titles and Operation of Credit, etc., it remains true that, compared to the changing requirements of commerce, the legal system stands still and becomes insufficient when it needs to be applied in concrete relationships. Such a situation should be favorable to arbitration.

The Law of June 12, 1908, on Chambers of Commerce provides, in Article 1, section VII, that the Chambers, through Committees appointed from their membership, may act as arbitrators or amicable compounders in controversies arising between merchants, manufacturers, proprietors, brokers or commission agents, or between any of these and private individuals, whenever the parties, by mutual agreement, submit such controversy to arbitration. It will be observed that under this law arbitration is not compulsory, but entirely voluntary, and subject to the desire of both parties.

In the ordinances of the Consulate of Mexico, dating from the end of the 16th Century and inspired mainly by the ordinances of the Consulates of Burgos and Sevilla, arbitration was provided for members of the Consulate. This arbitration was compulsory,

under the influence of the famous order known as *Clementina* and provided for an extremely simple procedure, free of every formality. Even the intervention of lawyers was unnecessary for, whenever the Consulate found that a complaint or reply had been formulated by a lawyer it was empowered to call the party who had presented it, and invite him to state his case, or his defense, orally. This procedure satisfied both the requirements for a commercial tribunal and the requirements for arbitration, for the arbitrators were merchants, familiar with trade practices and qualified to settle controversies submitted to them and, by their decisions, build up a body of commercial law.

Since the law on Chambers of Commerce of 1908 provides for voluntary arbitration, it is not compulsory to submit controversies to arbitrators and the results, as far as the merchants are concerned, are the same, whether they take their controversies to court or submit them to arbitrators; for in order to obtain the enforcement of awards parties must necessarily resort to courts, since the Chambers of Commerce or their Committees do not have the authority for enforcement. As a result, arbitration is not used, as parties will resort simply and directly to the Courts.

In addition, due to the very form of organization of Chambers of Commerce, there are always opposed interests at play, allowing for feelings to govern the acts of arbitrators and this leads to a certain hesitancy on the part of merchants, who may be in contractual relationship with the arbitrators, and to a certain lack of confidence in the justice of the awards. And it is beyond question that arbitration cannot exist without confidence. For this reason, although the Confederation of Chambers of Commerce has an arbitration Committee, nevertheless it only deals with unimportant controversies, and even that infrequently. There are few arbitral awards by the Committee, rendered during the twenty years that it has functioned, and before the Federation was formed the function of Chambers of Commerce was more that of amicable compounder than of arbitrator. In other words, the original function of such chambers was to act as mediators in controversies between business men in their district, but never did the Chambers render an actual decision, as merchants preferred to go to court for such decisions.

It is unquestionable that arbitration should be fostered, but it must be provided with adequate guarantees so that parties may be assured of a just decision. In addition, the law should not

interfere with arbitration, but on the contrary should encourage it; awards should be enforced and respected and procedure should be liberated from all steps which interfere with the performance of an award. For under the present mixed system of award and execution there is nothing but waste of time, delays, expense and irritation for those who submit controversies to arbitration. It is for this reason that arbitration has not had, in Mexico, the development which it has had in other countries whose legislators have grasped more clearly the importance of arbitration and have given it a more appropriate form.

PEACEFUL ORIENTATION OF PUBLIC INSTRUCTION

A Study in the United States

Maintenance and preservation of international peace—pacific settlement of controversies—these are relatively new ideas in the political history of the world. The process of developing them into concrete realities has been twofold. One approach is through international organization, requiring the concerted efforts and action of a group of governments; the other approach is through national education, and this is the burden and responsibility of individual governments or of individual institutions of education. The two approaches—however widely different they appear to be—depend upon each other: for organization provides the machinery for the maintenance of peace, but education provides the mentality which will use such machinery.

Recognizing the importance of education in the maintenance of peace, the Inter-American Conference for the Maintenance of Peace, at Buenos Aires in December 1936, took an important step toward its advancement in approving a convention concerning Peaceful Orientation of Public Instruction. Thereunder the High Contracting Parties agree to organize, in their public educational establishments, the teaching of the principles of pacific settlement of international disputes; they agree to prepare, through their administrative authorities on public education, adequate textbooks or manuals of instruction adapted to all school grades, including the training of a teaching staff; and they entrust the National Commission of Intellectual Cooperation with the fulfillment of these provisions.

The delegation of the United States was unable to subscribe to this convention, since the system of education in the United States

is not a unified system administered and controlled by the Federal Government, but is widely varied, both as to scope and as to administration by state or municipal authorities or by private institutions and individuals. However, the fact that no official adherence to the Convention and no official pledge of organization were possible, did not preclude the thought of obtaining the voluntary cooperation of the leading institutions and organizations in making a survey of the field, with a view to obtaining a picture of what is already being done and possibly framing recommendations for the further development of instruction in the principles of pacific settlement.

With this thought of voluntary cooperation the Pan American Union authorized the Inter-American Commercial Arbitration Commission to conduct a study in the United States and to report the results to the Pan American Union, such report to be used in conjunction with the results of the study being made by the Division of Intellectual Cooperation of the Pan American Union in the Latin-American Republics.

The Commission, under this authorization, prepared a questionnaire which has been sent to some 300 leading institutions of higher education and to the leading educational organizations and peace organizations in the country.

The questionnaire is intended to obtain information on the instruction of the subject of the pacific settlement of international controversies both in political relations and in the commercial and economic field. It includes an inquiry as to textbooks in use, as to special studies or theses which may be in preparation on the subject, as to special interest shown by students in any particular phase of the subject and as to any specific mention of the principles of arbitration or mediation in connection with the maintenance of friendly commercial and economic relations. Particular emphasis is placed on information concerning instruction on inter-American relations and concerning the activities of the Pan American Union.

From a preliminary examination of the replies received it appears that instruction on the subject is distributed over many departments in the same institution and in some of these receives emphasis, while in others it is fragmentary. With special reference to instruction in inter-American relations the range includes "no instruction"; "mentioned incidentally" in various courses —history, geography, international relations, government, American foreign policy, etc.; special courses in Latin-American His-

tory or Latin-America in general, on the Monroe Doctrine, or on current diplomatic relations with Latin-American Republics; discussion in seminars; and special discussions devoted to inter-American relations in Foreign Relations Clubs, Institutes of Public Affairs or other Conferences.

The replies on the more general subject of instruction in pacific settlement show an even wider range and lack of coordination. The subject may be treated in one or several departments—departments of political and social science, economics, business schools, law schools, summer schools. In some institutions the subject is treated in great detail; in others it receives scant consideration.

The inquiry which the Commission is undertaking endeavors to assemble this material, following all leads that may appear in the course of the study. A preliminary report is being compiled and a Committee of Experts is being invited to examine the data and to consider the suggestions received from the inquiry and to supervise the preparation of a final report.

In this manner there will be assembled, for the first time, a general picture demonstrating how the average American high school student and college graduate is being prepared for his share of responsibilty in helping to preserve peace and friendly international relations. It is believed that the survey will contribute toward a more general knowledge of the methods of maintenance of peace and may add to the qualifications of the youth of the country toward an intelligent approach to the subject in their economic and social activities.

NOTES AND COMMENT

Modern Transportation and Communication as an Aid to Goodwill. A record of the past few months demonstrates increasingly the new opportunities for the advancement of goodwill. A flying caravan of women undertakes a six-weeks cruise of South American Republics in order to stimulate the movement for the ratification of Treaties approved by the Buenos Aires Conference for the Maintenance of Peace.

Meanwhile the American Republics are brought closer together through a series of radio broadcasts sponsored jointly by the Pan American Union and the World Wide Broadcasting Foundation of Boston. The broadcasts, in Spanish, Portuguese and

French, bring talks by outstanding personages of Latin America and the United States, and Latin American music, as an interpreter of goodwill, completes the program. Another comprehensive educational program, the "Brave New World Series", brings to radio audiences in the United States a wider knowledge of the history, life and culture of the Latin American Republics.

Arbitration in the Argentine. Two recent communications from Argentina indicate that commercial arbitration is gaining ground. Under the auspices of the National Grain Board a number of arbitral tribunals have been functioning in various parts of Argentina. To these there has now been added an arbitral grain chamber for the Province of Entre Rios.

The principle that the award of arbitrators has the force and effect of the judgment of a court was recently reaffirmed by the Court of Appeal in a controversy wherein the loser refused to comply with the award and attempted to prove that he should not be bound by the award of the arbitrators. The principle that awards are final and without appeal was included as one of the basic standards of arbitration approved by the Seventh International Conference of American States and its recognition is an encouragement to the progress of arbitration.

Policy of Peaceful Negotiation. The statement of American Foreign Policy, by Mr. Hull, issued on July 16, 1937, includes the following sentence: "We advocate adjustment of problems of international relations by processes of peaceful negotiation and agreement." The statement, at the time is was issued, brought back echoes of approval from all American Republics. That these echoes were not empty sound, but a real acceptance of principle, has recently been proved in two instances.

As the result of discussions with the commission of good offices composed of representatives of the governments of Costa Rica and the United States of America, the governments of Honduras and Nicaragua signed, on December 10, 1937, at San Jose, Costa Rica, a peace protocol designed to prevent the development of any situation which might lead to renewed misunderstanding regarding their boundary.

Further evidence of the fundamental desire for peaceful settlement through resort to available machinery appears in the recent moves for settlement of the difference between the Dominican

Republic and Haiti. In an effort to avoid an aggravation of a situation precipitated by the migration of unemployed groups, a tender of good offices of three American republics (Cuba, Mexico and the United States of America) was made, followed by a suggestion for direct negotiation made by the government of the Dominican Republic, and finally by an agreement to resort to conciliation upon the invocation by the government of Haiti of the Gondra Treaty of 1923 and the Convention of Conciliation of 1929.

Comment from Panama. A recent issue of "Panama Commercial" (No. 22), issued in Panama City under the direction of Dr. Enrique A. Jimenez (collaborator of THE ARBITRATION JOURNAL), comments on commercial arbitration and points out the difficulty of the settlement of controversies between merchants of different countries and emphasizes the necessity of international agencies having the confidence of the parties. "Each country"—says the article—"has its own peculiarities with which arbitrators must be familiar, in order to give them and the systems wherein they are incorporated, due consideration in making their decisions. Hence the necessity to undertake a study of these matters without delay, and to clarify existing differences. That is the object of THE ARBITRATION JOURNAL . . . ."

Legislation in Colombia. A recent issue of the Bulletin of the Chamber of Commerce of Bogota reprints the arbitration bill pending before the Colombian legislature. In reprinting this bill the Bulletin says:

> "We are reproducing the important draft of a law which is to give validity to arbitration clauses in commercial contracts. This draft has been considered, approved and adopted by the Senate of the Republic in the three regular debates held at the sessions of August 20 and September 3 and 4.
>
> The bill is now before the Chamber of Representatives to which it was sent by the President of the Senate with message No. 348 on the 4th of September, in order that it may take its course in this honorable assembly where it has already been approved in the first debate.
>
> The bill reproduced below arouses exceptional interest among commercial organizations in the country, for it will facilitate and extend arbitral procedure, whereunder all commercial disputes between business men in this country or between Colombians and foreign business houses may be settled rapidly and practically.
>
> In adopting this bill as a law the Republic will have introduced a desirable reform of our commercial legislation with sound benefits to the development needed by modern life in the field of business."

ARBITRATION LAW

THE IMPLEMENTING OF ARBITRATION STATUTES *

BY

NATHAN ISAACS

THE PRESENT TASK IN ARBITRATION LAW

IF WE could look at the history of commercial arbitration in the United States from the vantage point of the future, I am inclined to think we might characterize the present stage as the period of the implementing of the modern statutes. Behind us, and running back for a century, future historians will see a long, uneventful period of quiescence or even decadence, a period in which the law discouraged arbitration. In this earlier period they will find a series of doctrines strangely at variance with the spirit of *laissez faire* and of freedom of contract prevailing at the time in other divisions of business law. Whole classes of agreements to arbitrate are held against public policy and void as "ousting the court of its jurisdiction". Submissions are held revocable to the last minute of rendering an award, and a hostile court is ready to review the award of arbitrators on the slightest pretext. It is typically a period of that irony of fate which forces the man who takes pains to avoid litigation on the substance of his claim to

* This article is the contribution of Prof. Isaacs, Professor of Law at the Harvard University Graduate School of Business Administration and a member of the Law Review Committee of the JOURNAL, to LAW: A CENTURY OF PROGRESS (1835-1935, in three volumes), published by the New York University School of Law on the occasion of its One Hundredth Anniversary, and is reprinted through the courtesy and with the permission of Prof. Alison Reppy, Editor. [Ed.]

fight in court over the merest shadow: the question whether or not the procedure under which he has won can stand. This unpromising period ends in the legislation still in process of development, of which the New York Act of 1921 may be taken as the model. The new legislation has many features, but essentially only three of them are sufficiently prominent to stand out in the kind of distant survey that will interest our future historian: the making of written agreements to arbitrate valid, enforceable, and irrevocable; the extending of their application to matters not yet in dispute; and the rendering of court aid possible in various details of procedure and enforcement.

Whatever the advocates of such legislation may have hoped for, the historian, it seems, will not be able to record any immediate response in the number of cases arbitrated, any sudden relief of crowded court calendars, any new meaning of arbitration in business life. No difficulty will be experienced by him in explaining this reluctance to change habits on the part of lawyers and litigants. He may single out the vested interests or the conservatism of the legal profession, the ignorance or canniness of the business man, the reasonableness of experimenting with small things first, and perhaps, when viewed from an unemotional distance, the general fitness of the courts for their every-day tasks in spite of occasional shortcomings. He may also find that the very nature of the subject has prevented available statistics from showing the real progress that was being made. But, it is submitted, the principal explanation will remain that the statutes were devoid of the necessary implements for making them immediately useful.

THE NATURE OF IMPLEMENTING

Implementing may be illustrated more easily than it can be defined.

1. A simple order of procedure may serve as a first illustration. Persons who have agreed to arbitrate may be at a loss to know what to do next, or even "whose move" it is, at any stage from the first suggestion of a breach of contract until the final adjustment of a dispute.

2. Even when the next step is indicated in the original contract or article of submission, it may leave the layman quite awed. Suppose, for example, he is expected to give "notice" of a

claim or make a " demand " for arbitration. The doubts raised in his mind are often sufficiently formidable to drive him to his lawyer or to procrastinate until it is too late to take advantage of the arbitration plan. The importance of simple, understandable, available, and safe forms thus constitutes a second phase of the work of implementing.

3. A third phase is reached in the all-important task of choosing arbitrators. The ordinary procedure, of course, is to have each side select a representative and the two thus selected choose a third. There are obvious difficulties and defects in such a system. In the first place, it tends to make two of the arbitrators partisans rather than judges. Again, it may cause a struggle to center upon the choice of an arbitrator in a contest in which assumptions of probable sympathies of the candidates are freely indulged in. Implementing by means of creating panels or furnishing the aid of impartial boards, committees, or consultants may go far to overcome these difficulties.

4. Implementing may include the furnishing of many other desiderata: for example, a fitting place, trained clerks, impartial keepers of records, stakeholders of things in controversy, and much else that our courts furnish at no little cost.

5. Finally, implementing includes the establishment of standards of conduct. It may be quite immaterial whether attorneys are admitted to the hearing or excluded, whether witnesses are separated or not, whether hearings are formal or informal, whether the traditional rules of evidence are applied or not, whether continuations are allowed on request or not, whether arbitrators may conduct their own investigations outside of the hearings or not; but it is quite material that some rules of the game be available, in order to avoid eternal bickerings about the rules themselves. In a word, something akin to parliamentary law and for much the same purpose is required.

Of course the importance of what is here called implementing is not limited to statutory arbitration, nor indeed to arbitration in general. Any permissive law is likely to be a dead letter for lack of it. Permission is not synonymous with opportunity. If under common-law arbitration there had existed the equivalent of a Cushing's *Manual of Parliamentary Practice* or a Robert's *Rules of Order* specifically for arbitration proceedings, the history or at least the statistics of commercial arbitration might have been more impressive. In any event, we may look critically at

the statutes to see what they have done toward supplying their own apparatus and what they have left to be worked out by the courts or by private initiative.

METHODS OF IMPLEMENTING: POSSIBLE AND ACTUAL

The theoretical possibilities for supplying an arbitration statute with working apparatus are numerous and, as all of them appear in one combination or another, a listing for analysis may be helpful.

1. In the first place, a statute may itself describe and create the implements for its execution. Some of the older statutes were in fact limited to just such points.

2. Theoretically a statute might provide for an administrative body to draw up rules and supply apparatus. This scheme is common in industrial arbitration, where an old or a new administrative board has been called on to facilitate or supervise the hearings. Some of the statutes on commercial arbitration reach out toward the idea by giving courts functions of the kind, but there are obvious limits beyond which the intercession of the courts is inconsistent with the main advantage of arbitration.

3. Again, implementing may be left to private initiative. By and large, this is the method of the modern arbitration statutes. It presupposes either a definite contract between the parties, covering all doubtful points of procedure, or a tacit assumption of a regular way of proceeding, which might be called the custom or common law of arbitration, applicable in so far as not inconsistent with the terms of the statute or of the contract.

The silence of the statutes on these matters has not had the effect of completely destroying their usefulness. They have been saved, in the first place, by the implementing tacitly and even thoughtlessly carried over from the traditions of litigation. In ordinary situations, both the parties and the arbitrators assume the attitudes and expect the treatment that they would receive in court. They try to frame an issue and to stick to it. It is taken for granted that irrelevancies will be avoided. There is, however, a limit to the effectiveness of such assumptions which is soon reached. The difficulties are entirely parallel to those that have developed in another modern attempt to simplify the procedure of litigation; namely, notice pleading. In simple cases of well-known types it has been found entirely satisfactory to substitute a

mere notice for the formal and formidable traditional documents in which claims and defenses are brought before courts. An explanation of the success of this substitution is that in a simple case, such as a streetcar or automobile accident, the allegations have become standardized so that any one familiar with the practice of that branch of the law can easily formulate all the regular allegations of negligence and the counter-allegations in the nature of denial or contributory negligence, and proceed to prepare for trial. Where, however, the extraordinary type of case comes up, or a novel situation is encountered, this kind of pleading—or absence of pleading—completely fails. In arbitration, too, there is a vast difference between the simple assumptions that may safely be indulged in where the purchaser of coffee or silk or leather alleges that the shipment is not up to standard and the more complicated type of case in which an exceedingly careful statement by both sides is necessary to confine the issue to manageable proportions. A single illustration taken from life may illustrate the matter. The members of one family, consisting of a father and four sons, have been engaged for many years in the real-estate and construction business. They have entered into many ventures, sometimes individually but more often in groups of two or three. Their capital and credit they have very freely made available to each other, sometimes on a profit-sharing basis, at other times on an interest basis, and most often on a simple basis of charges and countercharges, cleared up or partly cleared up in occasional settlements. At length one of their ventures turns out to be exceedingly profitable. Now the question arises: Was it an individual venture of one of the members of the family or a partnership undertaking? If a partnership undertaking, who were the lucky partners? And what other ventures must it be linked up with? In the actual hearing of such a case, in the absence of clear issues, the arbitrator adopted the plan of permitting each member of the family to tell his own story in his own way. This *Ring and the Book* method no doubt had its advantages. Perhaps the chief need of the occasion was just such a safety valve for the blowing off of steam. But it also had its disadvantages. The discursiveness of some of the witnesses knew no limits, and the arbitrator could hardly suggest that any part of the story was not potentially relevant. Furthermore, new issues were injected as the stories were unfolded, and it became clear that it would be exceedingly difficult to criticize as

not responsive to the issues almost any awards that might eventually be made. From a practical point of view, the loss of time, the danger of obscurity, the tendency to stir up animosities, and, in general, the uncertainties of such a procedure cast a serious doubt on the usefulness of arbitration.

In such complicated cases, private initiative has found escape from chaos in carefully drawn submissions. These frequently state not only the issues but also the practical rules of evidence and sometimes concessions or admissions by the parties. It is difficult to draw such submissions in a manner that will please both sides, even where both sides are represented by able counsel. It is exceedingly dangerous to copy them from case to case or from a form book, precisely because they go into those peculiar phases of cases that most distinguish one from another. In any event, it is impossible to draw a sufficiently comprehensive submission to implement adequately by providing for every possible contingency that may arise in the course of a hearing. If it were possible, it would be at least a great waste of time to do this for every case, and the process of negotiation leading up to it would, from a psychological point of view, be destructive of the opportunity to arbitrate—hence the emergence and the importance of organized efforts to supply the necessary implementing through outside organized agencies.

A CHALLENGE OF SELF-GOVERNMENT

This silence of the statutes, in a word, has served as a challenge to business organizations: chambers of commerce, stock and produce exchanges, trade associations including so-called guilds and institutes, and, finally, arbitration associations. Of course, the arbitration activities of such associations and also of religious, fraternal, and civic bodies were in progress long before the statutory changes that we are considering. What is new is the extent and significance of their aids, and their adjustment to take advantage of the statutes, rather than any radical invention. The largest single contribution is that of the American Arbitration Association, which has just issued its report of ten years of activity. A great part of this activity, to be sure, has been of a preliminary nature: propaganda, education, research and experimentation, the drafting and advocating of statutory changes. But its most noteworthy work at the end of the period and in all probability for the period immediately ahead of us is precisely the im-

plementing with which we are here concerned. The Association has promulgated rules calculated to serve as neutral rules of the road and as guideposts for ordinary commercial disputes. While it may generally be assumed that any rule is better than no rule and that, in general, simplicity is to be preferred to finesse and clarity to technical accuracy, there are as many problems involved in the preparation of a code as six hundred years of case law, court rules, and statutes have worked out for Anglo-American court procedure. In the main they are related to the very question, How far should arbitration be allowed to neglect or avoid the formalities that have grown up for litigation? The illustration of the family partnership already described is relevant here.

The American Arbitration Association has utilized an abundance of day-by-day experience as a basis for codification. Departing from the practice of most trade associations and chambers of commerce, it has put into its rules and into the rest of its apparatus enough of the flavor of the courtroom to encourage the participation of lawyers and to tend to bring about, so far as possible, the actual result that procedure at law would produce eventually. In most closed organizations whose tribunals are open to members only, there is a strong tendency to compromise rather than to decide disputes.

ARBITRATION AND SUBSTANTIVE RULES

Of course, where compromise is indulged in frankly it would be highly improper to use any decision as a precedent. In fact, something is gained by secrecy. Even where compromises are avoided it is dangerous to use the decisions of arbitrators as precedents in similar cases involving different litigants. Yet they are so used. In connection with the Actors' Equity Contract, for example, in which disputes over the same matters are constantly recurring, such a question as what constitutes ordinary clothing to be furnished by the actor and what constitutes a special costume tends in course of time to be answered in the acting fraternity on the basis of decisions that are rapidly whispered back and forth, and answered quite as effectively as on the basis of court decisions in more ponderous matters. It is not merely that an old award is cited in a new arbitration by way of argument; knowledge of a series of awards might well prevent the raising of a question again in a new dispute. Some trade associations are just as much interested in formulating their developing customs as they are in settling past disputes; these groups have with a mod-

erate degree of success proposed methods for the study of decisions, with a view to stamping some with approval as correct statements of business custom. Other associations, without taking any action so formal, run arbitration columns in their trade papers or otherwise publish the awards of arbitrators, and thereby tend to produce a somewhat similar practice of *stare decisis.*

The supplying of standards in this way may indeed go far beyond the mere implementing of arbitration plans. Theoretically, at least, such business customs can just as well be brought into court through competent witnesses. There is, however, an advantage in the directness and specific detail involved in their application by the arbitrators of a trade association that is entirely lacking when the custom must pass through the considerations of a judge and a jury, neither cognizant of nor necessarily sympathetic with the custom in question. It is, moreover, exceedingly helpful to have either a body of precedents or an officer or committee in authority to answer questions not merely of procedure but of substance. Of course, the distinction here, as in the law courts, between adjective and substantive law is more theoretical than real. Either type of question may develop into an impasse in an ordinary arbitration procedure.

TASKS AHEAD

The foundation of the arbitration of the future will have to be its satisfactory working. Propaganda or education may interest people in it. Compulsory clauses in the constitutions of trade associations may compel experimentation with it. Legislation may shape it. But in the end it will be established only for those cases or situations in which it works smoothly. Whether these situations are few or numerous depends, in the current stage of the history of arbitration in this country, on the way the laws are implemented. Progress has been made, but a great deal of experiment lies ahead of us. We cannot safely rely on the experience of any individual or group or even of any foreign country. The very condition that has made any arbitration possible here—the readiness with which we take the main principles of the common-law procedure for granted—militates against foreign borrowings or original schemes that work here or there. The ideal condition for a really useful arbitration plan in the world of business is thus still far off. But it can be envisioned. It will involve the possibility of selecting by simple reference some well understood and ac-

ceptable implementation in every contract or submission and proceeding under it so surely and expeditiously that substance can be handled with a minimum of concern about form.

REVIEW OF COURT DECISIONS

BY

WALTER J. DERENBERG

NEW YORK SUPREME COURT

Judgment Entered Upon Foreign Award Cannot be Attacked on Ground of Misconduct or Excess of Authority of Arbitrators. Motion to dismiss certain defenses as insufficient in law. The plaintiff partnership in England and the New York defendant had entered into an agreement for the sale of pepper. The agreement contained an arbitration clause, according to which any dispute was to be settled by arbitration under the rules of the General Produce Brokers Association of London. Subsequently, defendant refused to accept the pepper and plaintiff demanded arbitration. Both parties appointed an arbitrator and the two so elected appointed an umpire. During the course of the arbitration the defendant's representative requested the arbitrators to make the award in the form of a special case for submission to the court for determination of certain questions of law. The arbitrators made their award accordingly, and the High Court of Justice confirmed the award in July, 1936. Thereupon, plaintiff petitioned the High Court for an order to enforce the award as a judgment and gave notice of this application to the defendant. The motion was granted and judgment made and entered in favor of the plaintiff.

Upon these facts plaintiff now sets forth two causes of action: the first based upon this judgment and the second based upon the award as confirmed by the High Court.

The defense was raised that the arbitrators were guilty of misconduct in failing to annex to the award for submission to the court certain documents (green forms) which had been submitted to them as documentary evidence of the contract. It was alleged that under the rules of the British High Court the arbitrators were required to submit all material facts and documents necessary to enable the court to decide the questions of law. It was further alleged that the arbitrators had exceeded

their authority by awarding the total contract price of the pepper, and had ordered specific performance while, under the agreement, they were limited to a finding that in case of the buyer's failure to fulfill the terms of the contract the goods were to be resold immediately. *Held,* motion to strike out the defenses granted. Both of these defenses are insufficient as a matter of law:

> The law is well settled that a foreign judgment is conclusive on the merits and that it can be impeached only by proof that the court in which it was rendered did not have jurisdiction of the subject matter or of the parties, or that the judgment was procured by fraud.[1] . . . . This rule applies not only to matters which were actually litigated in the action or proceeding before the foreign tribunal, but also as to all matters which might have been litigated therein.[2] . . . . If the arbitrators were in fact guilty of misbehavior, their wrongful conduct should have been brought to the attention of the foreign court in any proceeding which followed the award and should have been litigated at that time. Whether or not the defendant took advantage of the opportunity afforded to him to litigate to his fullest ability and extent the matter before the foreign tribunal cannot be considered at this time, as these defenses interposed do not put in issue the jurisdiction of the foreign court nor raise a question or issue of fraud. These defenses must therefore be dismissed.

Sargent v. *Monroe,* Sup. Ct., Spec. Term, Pt. III, N.Y.L.J., November 20, 1937, p. 1755. Lauer, J.

Proof of Making Agreement to Arbitrate—Acceptance of Goods as Acceptance of Agreement. Motion under Section 1450, C. P. A., to order a jury trial to determine the existence of an arbitration agreement. The contract sued upon contained a provision that it was to become binding " only when signed and delivered by the buyer to the seller . . . . or when the buyer, or the person to whom the buyer has instructed the seller to make delivery, accepts possession of the whole or any part of the goods herein described." It is admitted that the buyer never signed the document in question and that, therefore, there was no contract in writing unless the buyer, or his nominee, accepted delivery of the whole or some part of the goods referred to in said document. It is admitted that the buyer did accept possession of part

[1] *Johnston* v. *Compagnie Transatlantique,* 242 N. Y. 381; *Dunstan* v. *Higgins,* 138 N. Y. 70, 74; *Cowans* v. *Ticonderoga Paper & Pulp Co.,* 219 App. Div. 120.

[2] *Jasper* v. *Rozinski,* 228 N. Y. 349; *Lynde* v. *Lynde,* 162 N. Y. 405.

of the goods, but his contention is that such acceptance was made pursuant to a wholly separate agreement between the parties which was in no way related to the document previously referred to, which he had repeatedly refused to sign. *Held,* jury trial directed. Although the respondent's version appears to be contrary to the weight of the credible evidence, there exists a question of fact as to the existence of a written arbitration agreement which, under Section 1450, C.P.A., must be submitted to a jury for determination. *Matter of National Silk Spinning Co., Inc.,* Sup. Ct., Spec. Term, Pt. I, N.Y.L.J. December 9, 1937, p. 2076. McLaughlin, J.

Possibility of Partiality and Bias of an Arbitrator—No Objection to Motion to Compel Arbitration. Motion to compel arbitration and stay a Municipal Court action. Respondent objects to the arbitration upon the ground that the agreement provided for the appointment of one B.C.H., an architect, who, he alleges, had been engaged professionally by the petitioner. *Held,* motion granted. The fact that the arbitrator had been employed by one of the parties does not justify an assumption, as a matter of law, that such arbitrator will act with unfairness or partiality in deciding the matter in dispute. If, after a hearing has been conducted and a determination rendered, the fallacy of this conclusion is disclosed, relief may be accorded respondent at the proper time. *Matter of Goldfarb,* Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., November 13, 1937, p. 1637. Dodd, J.

Arbitration Clause Under N.R.A. Code—Effective Notwithstanding Constitutional Decisions. Motion for an order to stay proceedings. The defense was raised, among others, that the arbitration clause which provided for arbitration pursuant to an N.R.A. Code had become ineffective from the time the N.R.A. was declared unconstitutional by the Supreme Court. *Held,* motion granted.

> The fact that the arbitration clause provides for arbitration pursuant to an N.R.A. Code, since declared unconstitutional, does not nullify the provision. (*Rosing-Cohn Corp.* v. *Horace Woolen Corp.,* N. Y. L. J., October 22, 1936, Special Term, Part I, aff'd. N. Y. L. J., January 30, 1937.)[1]

Botany Worsted Mills v. *S. L. Hoffman & Co., Inc.,* Sup. Ct., Spec. Term, Pt. I, N.Y.L.J., November 5, 1937, p. 1509. Shientag, J.

[1] Reported in 1 ARBITRATION JOURNAL 2, p. 205.

No Waiver by Joining Issues—Counterclaim—Laches. Motion to compel arbitration. The parties entered into a contract to charter a barge. The contract provided that any dispute should be referred to three persons as arbitrators and that their decision should be final. When disputes arose one party, Miller, instituted an action in the City Court to recover a certain amount alleged to be due him. Defendant, petitioner in this proceeding, answered the complaint alleging performance on his part, at the same time alleging an overpayment to Miller, the amount of which he claims to be due him, but no affirmative judgment against Miller was asked.

Miller now opposes arbitration on the ground that the petitioner, by joining issue in the City Court action and alleging a counterclaim, waived its right to arbitration. *Held,* motion granted. The summons and complaint in the City Court action were served on August 19, 1937, the answer on September 14 and the reply on September 18. On October 11 the petitioner obtained an order to show cause why the plaintiff should not be compelled to arbitrate. Moreover in its answer in the City Court action, petitioner alleged the agreement to arbitrate and claimed that agreement to be a bar to the City Court action.

Petitioner, therefore, is not guilty of *laches* and is entitled to the relief sought. *Matter of W. E. Hedger Transportation Corp.,* Sup. Ct., Spec. Term, Pt. I, N.Y.L.J., November 13, 1937, p. 1637. Dodd, J.

PENNA. COURT OF COMMON PLEAS

Industrial Arbitration—Runaway Shop—Collective Agreement. Motion by plaintiff (labor union) to enforce an arbitration award against defendants (employers). The issue before the arbitrator was whether or not the closing of defendants' Philadelphia plant and the concentration of all their manufacturing business in the City of Johnstown constituted a lock-out in violation of a three-year contract made between the plaintiff and the Philadelphia Waist & Dress Manufacturers' Association, of which the defendants were a member. Clause 25 of this contract provided:

> No member of the Association shall move his factory or factories outside of the City of Philadelphia during the life of this agreement.

The defendants maintained that they were not bound by the contract because they had entered into a separate contract with

the plaintiff which already had expired. Under this agreement defendants were not prohibited from discontinuing their operations in Philadelphia.

The arbitrator found that the defendants were bound by the agreement between the plaintiff and the Association, notwithstanding the foregoing separate agreement, and that the shutting down of the Philadelphia branch was a breach of that contract. In the award the arbitrator directed the reëstablishment of the Philadelphia plant and the reëmployment of the dismissed employees. This award was held void because the testimony before the arbitrator had not been taken under oath as required by the local Arbitration Act. The case was remitted to the arbitrator to be heard *de novo*. After hearing the evidence the arbitrator reaffirmed his prior decision. Thereupon the plaintiff filed its petition to confirm the award, and the defendants filed a petition to vacate same. Both petitions were heard and decided at the same time. *Held*, award confirmed and judgment entered. The Court said:

> This appears to be the first case in this jurisdiction to be instituted by a labor union under the Act of April 26, 1937, for the enforcement of an arbitration award under a contract with an Employer.
>
> The Union has resorted to legal process instead of the time-honored device of a strike to redress the wrongs which it believes it has suffered at the hands of the Employer. It is in the public interest that labor be encouraged to resort to legal process to redress its grievances rather than to those direct methods which have so strong a tendency to disturb the public peace and order. The whole trend of modern legislation upon the subject indicates the development of this well-settled public policy of the State. Both Federal and State Legislatures have provided machinery intended to avert the strike or lockout method of settling differences between labor and capital.

And with more specific reference to the present case:

> It is clear that this Employer's case rests upon the single question of fact whether it was a party to and bound by the agreement between the Union and the Association. We have examined the testimony presented before the Arbitrator, and although there was a conflict of evidence upon this point, there was ample to support his finding and our power to set aside his award only arises when it is unsupported by any testimony whatsoever, or was induced by fraud.
>
> It was not contended that the action of the Arbitrator was fraudulent or that he was imposed upon by fraud, and his finding therefore is binding upon all parties.

International Ladies' Garment Workers Union et al. v. *Goldstein & Levin,* 1 Labor Relations Report 8, p. 21, 1937. Kalodner, J.[1]

MICHIGAN SUPREME COURT

Authority of Arbitrator to Decide According to Strict Legal Principles—Construction of Scope of Submission. Bill in equity to set aside an award. The parties entered into a statutory submission agreement. The submission set forth in great detail the parties' mutual understandings concerning the construction of a building. Their dispute involved a claim for costs and damages sustained in connection with the performance of the construction contract. By the submission District Judge Webster, of the United States District Court, was appointed sole arbitrator "for the purpose of determining the relative rights and liabilities of the parties by virtue of the contractual relationship existing between them . . . ."

After the arbitrator had handed down his award, the plaintiff brought this bill in equity asking the court to set aside the award. Plaintiff alleged that the arbitrator had erred in assuming that the above submission was limited and not general in nature, and that he was not bound thereby to follow strict legal principles in construing the contract between the parties; the foregoing language of the submission agreement did not expressly limit the scope of the arbitrator's authority and that it was erroneous for him to confine his considerations to the purely legal aspects of the case other than its broader equitable aspects. Defendant moved to dismiss the complaint, and the motion was granted by the lower court. *Held,* affirmed.

None of the grounds mentioned in the complaint is covered by Section 15402 which expressly enumerates the grounds upon which an award may be vacated. Nor did this case come within the provisions which set forth the grounds to modify or correct an award. The jurisdiction of the court, therefore, could be based only upon the inherent jurisdiction of the Court of Chan-

[1] After this note was written, the Supreme Court of Pennsylvania reversed the decision of the lower court, on the ground that it had erroneously considered itself bound by the arbitrator's findings as to the existence of an arbitration agreement and that, moreover, under the Pennsylvania Arbitration Statute, the Court was powerless to grant equitable relief in form of a mandatory decree. The decision of the Supreme Court will be reviewed in the next issue. [Ed.]

cery over the award of arbitrators as recognized in Section 15415. That section provides that nothing in the arbitration law shall be construed to impair, diminish, or affect the power and authority of any court of chancery over arbitrators, awards, or the parties thereto.

Relying upon this section of the statute, the plaintiff attacked the award because of the following views as set down by the arbitrator in connection with his award:

> " Perhaps it is not improper to add that I have felt bound by the very terms of the arbitration agreement to decide the issues on the basis of the contractual rights of the parties under the contracts set forth in the arbitration documents, rather than on what might be termed broad moral principles. Had I been considering the questions from the latter standpoint, I would have been inclined, because of the manner in which the building was rushed to completion and the cooperation of the stone setters in the effort to keep the work to schedule, to have given them a substantially larger award, possibly a figure in the neighborhood of the loss established by the Gurd audit. But the arbitrator is dealing with contractual rights; and in even suggesting such a thing as moral rights is going beyond his sphere."

It was entirely appropriate, the Court ruled, for the arbitrator to decide the questions submitted as he did and that he did not misconceive the scope of his authority under the submission agreement. To quote the opinion of the Court:

> Courts in this jurisdiction and others have universally held that the arbitrator derives his power solely from the agreement between the parties. Applying that rule here, we must hold that the arbitrator was bound to determine the amount due plaintiff, not upon what it might be determined was plaintiff's loss, or defendant's gain, if any, but what would be a just and legal award after taking into consideration the contractual relationship existing between the parties and their performance, or nonperformance, of the terms of the contract or contracts that they had entered into.

The Court further observed that the detailed recitals of the construction contract in the arbitration agreement did not affect the scope of the arbitration agreement as to the authority of the arbitrator to decide according to the law applicable to the parties' contract. *Acme Cut Stone Co.* v. *New Center Development Corporation*, Supreme Court of Michigan, Sept. 1, 1937, 274 N.W. 700.

RHODE ISLAND SUPREME COURT

Appraisers' Failure to Give Notice of Hearing as Misconduct Invalidating Award. Bill in equity by the insured to set aside an appraisal and award rendered by three appraisers under certain fire insurance policies. The policies were of Rhode Island standard form containing provisions for determination by appraisers of any loss covered thereby. Each party appointed an arbitrator. They failed to agree and appointed an umpire in accordance with the policies. The differences between the appraisers were submitted to the umpire who made certain *ex parte* investigations and held certain *ex parte* conferences. An agreement of all three failing, the two original appraisers signed and delivered an award.

The plaintiff attacked the award as grossly inadequate and challenged the appraisal proceedings on the ground that neither the appraisers nor the umpire gave the parties any notice of the appraisal proceedings nor any opportunity to be heard or to present evidence before them concerning the amount of loss, either before or after the intervention of the umpire. The lower court held that the appraisers and the umpire had improperly excluded much evidence offered by the complainant and having an important bearing on the decision and that, therefore, the award should be set aside. *Held*, affirmed.

> " We are of the opinion," to quote the Supreme Court of Rhode Island, " that, although the experts in building construction, such as were the appraisers and umpire concerned in this case, probably have a right to base their appraisals and award of loss and damage on information obtained by them by inspection of the damaged premises, in the ordinary fire insurance case, where the damages caused by the fire are only partial, it is entirely improper for them in a case such as this, where the insured property was practically totally destroyed and they were not personally acquainted with the construction and conditions thereof not long before the fire, to proceed as the appraisers and umpire in this case proceeded.
>
> " There is good authority that in such a case a hearing or hearings should be held, at which sworn testimony is presented, or at any rate may be presented, by the parties interested, though such a hearing need not be conducted in accordance with the strict rules of procedure and as to the admissibility of evidence which prevails in court hearings or trials."

The Supreme Court further ruled that a court of equity having once been asked to set aside an award may retain jurisdiction to decide the entire controversy and to adjudicate the case on its

merits instead of ordering a new arbitration or appraisal. *Gregory et al* v. *Pawtucket Mutual Fire Insurance Co. et al,* 193 Atl. 508 (1937).[1]

FOREIGN JURISDICTIONS

(England). Appointment of Third Arbitrator — Umpire — Whether Notice Necessary—Custom—Misconduct. Applicant and respondent entered into a sales contract "subject to the customary terms and conditions and subject to the rules and regulations of the London Metal Exchange, insofar as these rules and regulations do not conflict with the provisions of this contract." The contract further provided: "Any disputes arising out of this contract must be settled in accordance with the rules and regulations of the London Metal Exchange. Dispute having arisen between the parties, each party appointed an arbitrator pursuant to the rules of the Exchange. A hearing was had before the two arbitrators. Afterward, without notice to the parties, the two arbitrators appointed a third arbitrator and the three arbitrators met and signed an award. Respondent now moves to have the award set aside under Sec. 11, Par. 2 of the Arbitration Act of 1889, which provides that where an arbitrator or umpire has misconducted himself or where an arbitration or award has been improperly procured, the Court may set aside the award. *Held,* motion granted and award set aside as inconsistent with the rules of the Metal Exchange.

Although the two arbitrators undoubtedly had the right to appoint the third arbitrator, the question arises whether the three arbitrators can make an award without giving notice to the parties of the intention to do so and without giving them an opportunity of discussing the matter before them. The rules of the Exchange provide: "The Arbitrators may adjourn the hearing from time to time, giving notice to the parties, and may, after giving notice of any appointment, proceed in the absence of either party, or of both parties, if they shall think fit."

From this language it must be inferred that it is the duty of the arbitrators not to proceed with the arbitration without giving the parties notice. There was no notice to the parties here before

[1] With regard to *Appraisals Under Arbitration Laws* in general cf. Kupfer and Danziger, 1 ARBITRATION JOURNAL 1, p. 92; and (the same authors) *Appraisal and Arbitration,* 1 ARBITRATION JOURNAL 4, p. 368 (1937).

the matter went to the tribunal of the three arbitrators who, by Sec. 4, Par. 1 of the Arbitration Act of 1934, are an umpire and two arbitrators.[1] The failure to give notice to appear before the tribunal constitutes misconduct and this despite the allegation by the applicant that such procedure is in accordance with the common practice in the trade. Such a practice is wholly inconsistent with the rules and cannot validate the award or affect the contract by the parties.

> . . . . it cannot be the law that a decision of a tribunal can be binding on a party who, at the time of the giving of the decision, was entirely ignorant of the existence of the tribunal.

The matter having been conducted in a manner inconsistent with the rules, the award must be set aside. Clauson, J.

(Austria). Articles of Association Containing Arbitration Clause Binding Upon New Members. Where in the articles of an association the charter members expressly agree to submit all controversies to arbitration, a newly accepted member automatically becomes a party to such agreement and is bound thereby as soon as he is notified of his acceptance as a member. It is not necessary under Austrian law that there be a separate document signed by both of the parties in order to enforce an arbitration agreement. Although the agreement must be in writing, it is sufficient that such a provision was incorporated in the articles of the association, which would then become binding upon a new member by the association's written acceptance of his membership.

In the same decision it was held by the Supreme Court that the arbitrators do not exceed their authority by charging the plaintiff with the entire costs of the proceeding although his complaint was only partly dismissed.[2]

[1] Sec. 4, Par. 1 reads as follows:

> "Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties."

[2] Decision of the Austrian Supreme Court of June 9, 1937, (3 Ob 402/37), contributed by Dr. Emil v. Hofmannsthal, Vienna.

BOOK REVIEWS AND NOTES

The Sources of Modern International Law. By George A. Finch. Carnegie Endowment for International Peace, Washington, 1937. Pp. ix, 124.

The author of this book is Assistant Director of the Division of International Law of the Carnegie Endowment for International Peace and managing editor of the American Journal of International Law. In a series of lectures at the summer session for teachers of international law, given at the University of Michigan, under the auspices of the Carnegie Endowment, the author endeavored to present the topic from the point of view of many writers and thinkers of various national origins and at various historical periods. " A science affecting the destiny of the whole human race cannot be properly developed from particularistic or nationalistic embryos " (p. vii). The author traces the growth of a law of nations from the rise of territorial sovereignty after the Thirty Years War but having its roots in an earlier period. It is interesting to observe the important rôle of arbitration in these early periods. The function of arbitration was also recognized in the early plans for European organization, such as in the plan of Pierre Dubois in 1306, of Henry IV of France in the sixteenth century, of Crucé in the seventeenth, of the Abbé Saint-Pierre and of Kant in the eighteenth century. The author traces the development of international law through the natural-law philosophers, modern text writers, treaties and the custom of nations, down to our own day. He discusses the development of sea law in peace and war, and the authority given to the laws of war by prize courts (pp. 53-54).

What interests us particularly is the part that international tribunals have played in the development of international law. He points out that the term " arbitration " was formerly applied to all the various forms of international settlement by commissions. The organization of the two Hague tribunals changed the connotation, but the author emphasizes the fact that there is no distinction between the nature of a justicable and a political question the moment two governments agree to arbitrate the

question or submit it to some form of judicial settlement. To all methods of settlement by a tribunal, permanent or *ad hoc*, Judge John Bassett Moore, to whom the author refers, applies the comprehensive term "international adjudications". The author believes that around the Hague courts "is centered much of the hope of the world for the gradual enlargement of the reign of law in the settlement of international disputes" (p. 96). He might well have referred to the disappointing rôle which the United States has thus far played in official coöperation toward the realization of this hope.

The book is an invaluable guide to both specialists and laymen in affording a proper prospective for an approach to the subject in its wider aspects.—ARTHUR K. KUHN.

Peace Without Pledges. By A. J. Jacobs. Hutchinson & Co., Ltd., London. 93 pp.

The central theme of this book is the voluntary association for mutual protection among nations resolved to end war. The author points out as hindrances to peace the general observance of neutrality laws or pledges, economic boycotts and other collective action, the belief that the suppression of war must wait for the establishment of law and that disarmament will prevent war. It is the view of Mr. Jacobs that there should be no standing pledges among nations, but whenever a nation proceeds to war the others should voluntarily unite and call a plenary conference to prevent the breach of the peace, resorting to force if necessary, and when this act has become effective, nations return to their routine affairs.

Inventions and Their Management. By Alf K. Berle and L. S. De Camp. International Textbook Company, Scranton, Pennsylvania, 1937. 732 pp.

The authors, starting out with the idea that inventing is a business, attempt in this book to help inventors make the most of their inventions by entering into appropriate agreements with those who undertake to exploit the patent. While the first twenty chapters are concerned with matters in connection with obtaining patent protection, Chapters 22 to 30 deal specifically with the problem of how to derive income from the patent. There are, according to the authors, three different types of contracts from which to derive income from a patent, without dividing its owner-

ship. The first type of agreement, called the " individual contract method ", gives title to the whole patent to one of the parties, who agrees to pay the other parties certain percentages of the net income from the exploitation of the patent. The second type consists of a " trust agreement " (p. 357) under which the patent is assigned to a trustee so that he gets legal title and may sell the patent and do anything required by the trust agreement. The formation of a " patent holding company " constitutes the third type of agreement (p. 360), under which the patent is turned over to the holding company, which is specially created for the purpose of holding and exploiting the patent.

It is of particular interest to readers of THE ARBITRATION JOURNAL that the authors, who have had vast experience in the field of patent exploitation, recommend the insertion of arbitration clauses in all three types of agreements.

The drawing up of license agreements is frequently beset with difficulties both factual and legal. The authors, in discussing the royalty license (Chapter 29, p. 441 *seq.*) and the problem of computation of royalties, again strongly recommend the insertion of an arbitration clause with regard to future contingencies and disputes that may arise out of the license agreement (p. 458), quoting (p. 466) an arbitration clause such as is recommended by the authors for license agreements.

Finally, it may be mentioned that in describing the aircraft patent pool (p. 591), as administered by the Manufacturers Aircraft Association, Inc., the authors again point out that under the pool an arbitration board has been appointed to decide how much the Association has to pay each member under the agreement.

From a digest of this interesting book the reader is easily led to the conclusion that many of the problems that arise with regard to patent sales and license agreements, as well as pooling contracts, peculiarly lend themselves to arbitration and that the insertion of carefully worded arbitration clauses in such contracts will often prevent unnecessary and highly expensive litigation in the courts.—WALTER J. DERENBERG.

Problems in Labor Relations. By Herman Feldman. The Macmillan Co., New York, 1937.

" To disturb the conservative in his beliefs and force him to think over his ideas anew; to disturb the progressive and lead

him to analyze more closely the basis of his faith." With this as his avowed purpose, the author has approached the subject of Labor Relations, endeavoring to point out how labor problems may be analyzed and in what basic respects the labor problems of the individual business man are similar to those confronting the great bulk of employers.

Today, with labor and the problems connected therewith occupying the spotlight of the business stage, such a book is timely. Prepared for use in the class-room, it offers to the student an opportunity to observe every facet of the labor problems encountered in the business world and affords him an ample opportunity to view the positions of both labor and capital. Thus the student may acquire a working knowledge of the subject with a view to a possible practical application to present or to future situations.

The book is divided into six sections for ease of analysis and discussion, and in Part Six are discussed problems concerning strikes, boycotts, arbitration of disputes and union regulation.

The author has presented a great number of labor problems in case form, equally interesting to the active participant in business or the impartial observer. The solutions to the various cases are not given; in fact, in some cases it would seem that solutions cannot be given. But the author, by setting forth the problem and pointing out the arguments pro and con, stimulates the reader's desire to reason out the problem himself, while affording him full opportunity to do so by a clear exposition of the factors involved.

From the foregoing, it can readily be seen that this is a book which should be in the library of every person interested in the subject of Labor Relations. Although, as has already been stated, it was intended as a class-room study, it accurately depicts cases which turn up constantly in actual business and should appeal to those actually engaged in fields affected by labor problems. Employers, in particular, should find the book helpful as presenting a comprehensive view of the entire labor situation of today. Arbitrators, too, will find it of value in preparing themselves for proper performance of their duties.

It is to be hoped that this work may aid in bringing both labor and the employer to a realization that the other's position may possess some merit and so foster better handling of the problems of each in an amicable atmosphere.—SIDNEY A. WOLFF.

NOTES

The World League for Permanent Peace has sponsored the publication of *The Law of Nations* by Dr. Marcellus Donald A. R. von Redlich. Chapter XV of this comprehensive volume is devoted to arbitration. The chapter refers briefly to the history of arbitration, with considerable emphasis on American treaties, and contains a list of the more recent arbitration treaties entered into by the U. S. A. Machinery for arbitration by the League of Nations and the Permanent Court of Arbitration at The Hague is described and reference is made to the proposed Court of Arbitral Justice, for which a draft Convention was drawn at The Hague Conference of 1907, but which never materialized, and to the Central American Court of Justice which functioned for a short period. Chapter XVI deals briefly with the early beginnings of the Pan American movement, the Monroe Doctrine and Pan American Conferences. It is to be regretted that these sections are so brief and that some of the latest developments in international and inter-American thought and action are not included.

The student of international questions might also find it easier to discriminate between realities and projects, were there a more distinct line of differentiation between the author's description of achievements and his references to plans.

Generally speaking, the chapters reviewed are a bird's-eye view, covering wide ranges of knowledge. Since they are only a small part of the general perspective of the book, the data must be used with this fact in mind.

The Journal of Comparative Legislation and International Law (Third Series, Vol. XIX, Part IV) contains on p. 293 a comment on the series of pamphlets issued by the International Chamber of Commerce concerning commercial arbitration under British, Belgian, Dutch, French, German, Italian and Swiss Law, by R. S. T. Chorley. This review points out the differences and points of similarity between these laws and one of the reviewer's interesting conclusions follows:

> "Considering the wide divergences in both substantive and adjective law between one country and another one is struck by the fundamental sameness of the different systems on the law of arbitration. Differences there are, and these sometimes important, but there are only a

very few of such a character as to pull a man up short and say, this system is so different from my own that I will not consent to make use of it."

The International Quarterly (Autumn, 1937, Number), spokesman for The International Houses in the United States, is pursuing that effective form of international education whereby its readers are being made acquainted with some interesting aspect of life in the countries from which their residents come, carrying out the idea that to know and appreciate is, in the last analysis, the best form of promoting international understanding and education as a basis of peace.

Foreign Affairs for October, 1937, contains an article on *Legislation for Industrial Peace* by Norman Thomas, describing conditions in Scandinavian countries, Great Britain and France, with particular reference to compulsory arbitration and the inadequacy of present methods.

BOOKS RECEIVED *

Drama of Upper Silesia. By William John Rose. Stephen Daye Press, Brattleboro, Vermont.

Goodwill as a Business Asset. By H. E. Seed. Gee & Co., Ltd., London.

How to Deal with Organized Labor. By Alexander Feller and Jacob E. Hurwitz. Alexander Publishing Co., New York.

The Mind of the Juror. By Albert S. Osborn: Boyd Printing Co., Albany.

Selected Cases on Commercial Contracts. By A. Cecil Caporn. Stevens & Sons, Ltd., London.

Settlement of Canadian-American Disputes. By P. E. Corbett. Carnegie Endowment for International Peace, New York.

The Supreme Cause. By Estelle M. Sternberger. Dodd, Mead & Co., New York.

Trade Centers and Trade Routes. By Eugene Van Cleef. D. Appleton-Century, New York.

The Contribution of English Equity to the Idea of an International Equity Tribunal. By Wolfgang Friedmann. Constable & Co., Ltd., London.†

* The inclusion of a book under this heading does not preclude a later review.

† To be reviewed as a series in the April issue of the JOURNAL.

Justice and Equity in the International Sphere. By Norman Bentwich, A. S. de Bustamante, Donald A. McLean, Gustav Radbruch and H. A. Smith. Constable & Co., Ltd., London.*

William Ladd: An Examination of an American Proposal for an International Equity Tribunal. By Georg Schwarzenberger. Constable & Co., Ltd., London.*

PERIODICAL LITERATURE

FOREIGN

JURIDICAL REVIEW (Edinburgh), June 1937, *Exhaustion of Submission* (*Donald* v. *Shiell* (1937) S. L. T. 70), pp. 181-2; LAW TIMES (London), September 18, 1937, *Arbitration and the Statute of Limitations*, pp. 212-14; NEW ZEALAND LAW JOURNAL (Wellington), June 22, 1937, *The Court of Arbitration*, pp. 149-50; SOLICITORS JOURNAL & WEEKLY REPORTER (London), July 10, 1937, *Arbitration and Valuation*, pp. 565-6.

UNITED STATES

Legal

AIR LAW REVIEW, April 1937, *Broadcasting Industry; Compulsory Arbitration; Constitutional Law*, pp. 158-68; MINNESOTA LAW REVIEW, May 1937, *Labor Disputes; Parties; Necessity of Notice and Hearing* (*Nord* v. *Griffin*, 86 F(2nd) 481), pp. 738-9; NEW YORK UNIVERSITY LAW QUARTERLY REVIEW, May 1937, *Survival of Award after Discharge*, pp. 504-9; WASHINGTON LAW REVIEW, July 1937, *Appraisement; Labor Disputes* (*Gord* v. *F. S. Harmon & Co.* (Wash.) 61 Pac. (2nd) 1294) pp. 212-3.

General

AMERICAN MACHINIST, July 28, 1937, *Arbitration: A Cost Saver*, Thomas J. Watson, p. 655; AUTOMOBILE TOPICS, July 5, 1937, *Arbitration Re-examined*, p. 385; CIVIL ENGINEERING, July 1937, *Arbitration versus Litigation*, Malcolm Pirnie, p. 445; COMMERCE REPORTS, June 5, 1937, *Rule for Commercial Arbitration within the British Empire*, H. De Courcy, p. 451, and *Arbitration in The British Empire*, Guerra Everett, p. 583; CONSTRUCTOR, December 1937, *The General Contractor and Arbitration*, F. L. Van Schaick, pp. 22-3; CREDIT AND FINANCIAL MANAGEMENT, July 1937, *Arbitration: Its Value in Maintaining Credit*, Hermann Irion, pp. 6-7; EPWORTH HERALD, November 6, 1937, *Arbitration: A Better Way*, Amy Blanche Greene, p. 647; MODERN MEXICO, December 1937, *Inter-American Commercial Arbitration and Goodwill*, Herman G. Brock, pp. 12-4; NINETEENTH CEN-

---

* To be reviewed as a series in the April issue of the JOURNAL.

TURY, December 1937, *Reform of the Law; Commercial Arbitration*, B. A. Wortley, pp. 738-51; PHOTO-LITHOGRAPHER, August 1937, *Why Not Arbitrate?* Herbert H. Levess, pp. 17-19; SCREEN GUILD MAGAZINE, November 1937. *Vital Issues to Arbitration; Don't Shirk Your Duty*, p. 17; SYNAGOGUE LIGHT, November 1937, *Arbitration to the Rescue*, Moses H. Grossman, pp. 174-5; WORLD AFFAIRS, September 1937, *Commercial Arbitration in the United States and Latin America*, Herman G. Brock, pp. 169-73.

FRANCES L. VAN SCHAICK.